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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 169.

THE BRITISH QUEEN MINING COMPANY OF COLORADO
PLAINTIFF IN ERROR,

vs.

THE BAKER SILVER MINING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED OCTOBER 10, 1887.

states, so that as between them a suit thereon might have been maintained in the Circuit Court.

Brock vs. North Western Fuel Co., 130 U. S., 341.

The mandate of this court upon such reversal having been entered of record in the court below, the plaintiff in error was given an opportunity to amend its declaration showing jurisdictional facts, if it could, but failed to do so.

Thereupon, it having been shown by evidence to the court below that pending the former appeal the plaintiff in error had collected from the defendants, on execution, a portion of its judgment, and that the sum so collected amounted with six per cent. interest to ....., the court below, upon a motion of defendants to that effect, awarded them a judgment in restitution for said sum of .. .., with interest.

To reverse this judgment in restitution the plaintiff in error now brings the cause to this court on writ of error.

The plaintiff in error did not claim the sum of $5,000 in the court below. The judgment against it in the court below is less than $1,000. The cause is now in this court under the provisions of the Act of February 25th, 1889, Chapter 236, the plaintiff in error seeking to reverse the judgment below upon the ground that the court below had no jurisdiction to render such judgment.

MOTION.

Upon the record and the foregoing statement of facts the defendants in error move the court that this cause be advanced, as provided for by Rule 32, and be submitted under said rule, and Rule 6.

CHAS. A. CLARK,
Attorney for Defendants in Error.

NOTICE OF MOTION.

To the Northwestern Fuel Company, the above named Plaintiff in Error, or to Henderson, Hurd, Daniels & Kiesel, its Attorneys:

You are hereby notified that the foregoing motion in the above entitled cause will be submitted to the Supreme Court of the United States, by defendants in error in said cause, on the .... day of December, A. D. 1890.

CHAS. A. CLARK,
Attorney for Defendants in Error.

ACCEPTANCE OF SERVICE.

Service of the foregoing notice is accepted, and copy thereof received this .... day of December, 1890.

....
Attorneys for Plaintiff in Error.

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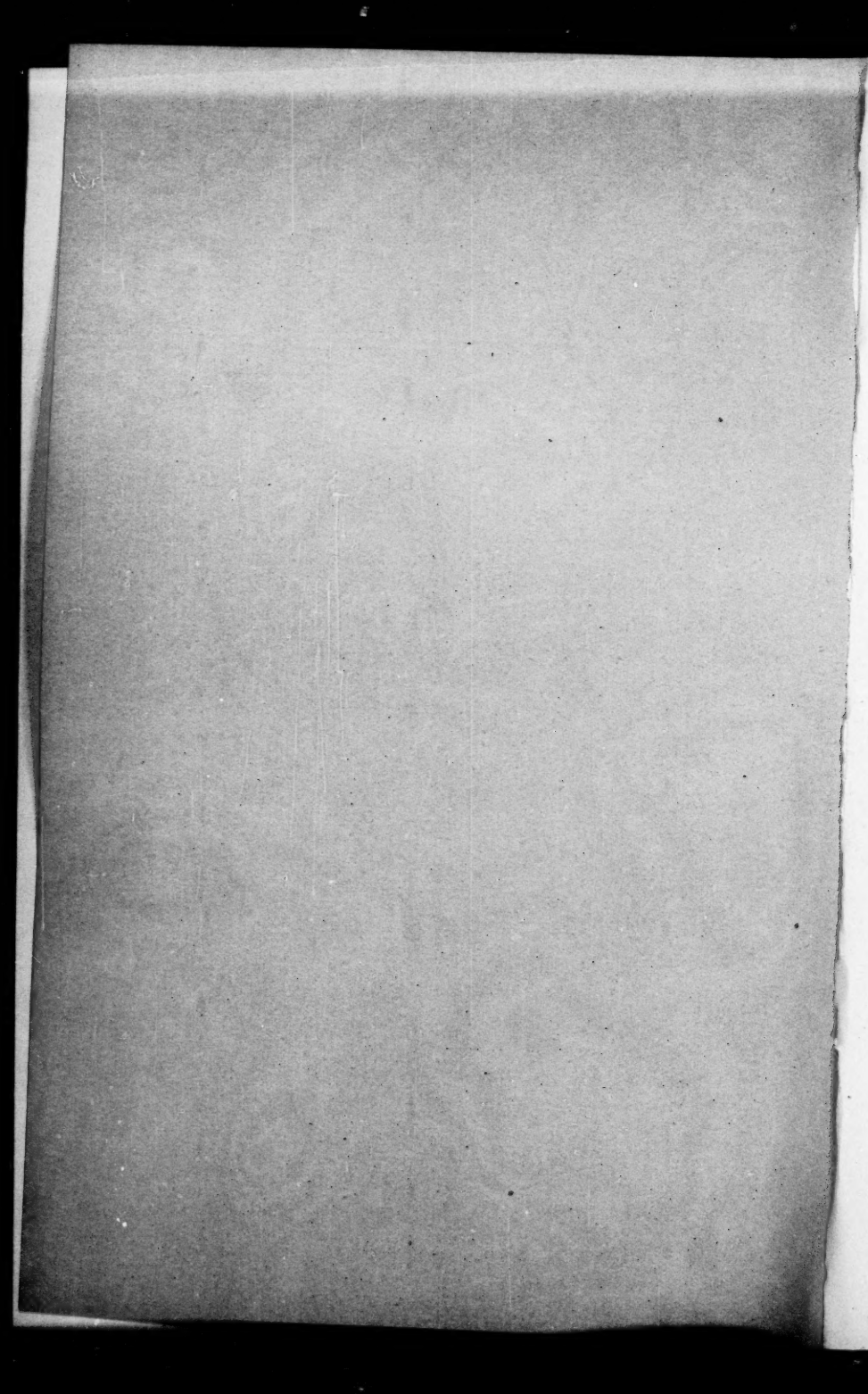

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INDEX.

	Original.	Print.
Caption	1	1
Complaint	1	1
Summons	6	4
Marshal's return	8	5
Answer	9	5
Replication	13	8
Order for judgment	15	9
Judgment	16	9
Order setting aside judgment and granting new trial	20	11
Order continuing cause	21	12
Order commencing trial	21	12
Order taking cause under advisement	22	12
Order for judgment	22	13
Judgment	24	13

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 2, 1890.

	Original.	Print.
Bill of exceptions	28	16
Judgment in Betts *vs.* Baker Silver Mining Co.	29	17
Testimony of R. D. Weiser	36	17
" " Charles W. Betts	47	26
Findings of fact	50	28
Bond	54	30
Writ of error	57	32
Citation	59	33
Clerk's certificate	61	34

1 Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

Be it remembered that heretofore and on, to wit, the 24th day of September, A. D. 1883, came Abraham Kline, Charles W. Arny, and The Baker Silver Mining Company, by Wells, Smith and Macon, Esqrs., their attorneys, and filed in said court their complaint and sued out of said court a writ of summons against The British Queen Mining Company; and the said complaint is in words and figures as follows, to wit:

Complaint.

THE UNITED STATES OF AMERICA, }
State and District of Colorado. }

In the Circuit Court of the United States for said District.

ABRAHAM KLINE, CHARLES W. ARNY, THE BAKER SILVER MINING COMPANY, a Corporation, Plaintiff,
against
THE BRITISH QUEEN MINING COMPANY OF COLORADO, Defendant.

2 The plaintiffs, complaining of the said defendant, say—

That said The Baker Silver Mining Company is a corporation organized and existing under the laws of the State of Pennsylvania.

That said plaintiffs are and each of them is a citizen of the State of Pennsylvania.

That said defendant, The British Queen Mining Company, is a corporation organized and existing under the laws of the State of Colorado and a citizen of the State of Colorado.

That the matter in controversy herein exceeds the sum or value of five thousand dollars.

That heretofore, to wit, on the 1st day of August, A. D. 1879, the said plaintiffs were possessed of those certain premises known and described as the Baker lode, being the same premises designated by the surveyor general of the United States for the district of Colorado as mineral survey number 53, the bounds whereof are as follows, to wit: Beginning at a monument on the summit of Kelso Mountain, marked XX, established as an initial point to the survey of the Huldah lode, and from which monument Erwin's Peak bears south forty-six degrees twenty-one minutes (46° 21′) west, variation fifteen degrees thirty minutes (15° 30′) east, thence south forty-five degrees fifty-two minutes (45° 52′) east seven hundred and ninety-one (791) feet to the northwest corner of said Baker lode, from which Erwin's Peak bears south fifty-one degrees forty-five minutes (51° 45′) west; running thence north fifty-one degrees (51°) east sixteen hundred (1,600) feet to the northeast corner of said Baker lode; thence south thirty-nine degrees (39°) east fifty
3 (50) feet to the southeast corner of said Baker lode; thence south fifty-one degrees (51°) west sixteen hundred (1,600)

feet to the southwest corner of said Baker lode; thence north thirty-nine degrees (39°) west fifty (50) feet to the place of beginning, containing one and eighty-four-hundredths (1.84) acres, in which said premises the plaintiffs had and have an estate in fee simple absolute; and those certain other premises known and described as mining claims numbers one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8) east from the discovery and mining claims numbers one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8) west from the discovery on the Baker Extension west lode; also those certain other premises known as the Baker Fraction lode, being one hundred (100) feet in length, more or less, along the vein of the said lode and lying westerly from the said Baker lode and between the same and the said Baker Extension west lode, all the said premises lying and being contiguous and being thirty-three hundred (3,300) feet in length, more or less, along the same lode or vein, situate on Kelso Mountain, Argentine mining district, in the county of Clear Creek and State of Colorado, and being the same premises in the year 1866 and in divers years thereafter until on or about the first day of August, A. D. 1879, occupied, possessed, and worked by the said plaintiff, The Baker Silver Mining Company, in which said last-mentioned mining claims situate on said Baker Extension west lode and the said Baker Fraction plaintiffs had and have the the right to occupy and possess the same by virtue of the location thereof as a mining claim in the public domain by divers citizens of the United States and by virtue of divers conveyances thereof to the plaintiffs and a compliance
4 by plaintiffs and their grantors with the acts of Congress, the laws of the State of Colorado, and the rules and regulations of the said mining district, and by right of the actual prior possession thereof by the plaintiffs and their grantors as a mining claim in the public domain of the United States; also one certain mill site, containing one and seventy-two-hundredths (1.72) acres of land, more or less, situate in the town or village of Bakerville, in Argentine mining district aforesaid, bounded and described as follows, to wit: Commencing at a post marked XX in a mound of stones at the confluence of Kelso creek and the South Branch of South Clear creek, from which a pine twelve (12) inches in diameter bears south sixty-nine degrees twenty-two minutes (69° 22′) east twenty-eight (28) feet, a pine seven (7) inches in diameter bears south forty-two degrees thirty minutes (42° 30′) west thirteen and eight-tenths (13.8) feet, Erwin's Peak bears south fourteen degrees (14°) west, variation fifteen degrees (15°) east; running thence south fifty-nine degrees one minute (59° 1′) east three hundred and sixty-three (363) feet to the northwest corner of said mill site, a post; thence north seventy-five dedegrees (75°) east two hundred and fifty (250) feet to the northeast corner of said mill site; thence south fifteen degrees (15°) east three hundred (300) feet to the southeast corner of said mill site; thence south seventy-five degrees (75°) west two hundred and fifty (250) feet to the southwest corner of said mill site, a post; thence north fifteen degrees (15°) west to the place of beginning, variation on all courses 15° 30′, being the same premises described by the surveyor

general of the United States for the district of Colorado as mineral survey number 54, together with the certain mill, boarding-house, shops, stable, and other tenements by the said plaintiff, The Baker Silver Mining Company, heretofore erected thereon; also the
5 certain premises known as lot number two (2), in block number eight (8), in the town of Georgetown, according to the official plat thereof, being fifty (50) feet in width, fronting on Hale street, and one hundred (100) feet in depth, with the buildings erected thereon; in which said mill site, lot, and premises last aforesaid plaintiffs had and have an estate in fee simple absolute.

And the said plaintiffs being so possessed of the said premises and entitled thereunto, the said defendant on, to wit, the 1st day of August, A. D. 1879, at the the said district, wrongfully entered therein and ousted the plaintiffs and hath ever since wrongfully withheld and still withholds from the plaintiffs possession thereof and of the whole thereof, with the rents, issues, and profits of the said premises, which the plaintiffs say for the time of defendant's said unlawful occupation thereof amounted to one hundred thousand dollars ($100,000), and in the said mining premises defendant, during such unlawful possession of the said premises, committed great waste and and mined, extracted, and carried away therefrom divers, to wit, ten thousand tons of ores bearing gold, silver, and other precious minerals, of great value, to wit, of the value of one hundred thousand dollars ($100,000), to the plaintiffs' damage in one hundred thousand dollars ($100,000).

Wherefore plaintiffs demand judgment against the said defendant for possession of the said premises and for one hundred thousand dollars ($100,000), its damages aforesaid, and its costs.

(Signed) WELLS, SMITH & MACON,
Plaintiffs' Attorneys.

6 (Endorsed:) 1341. C. C. Abraham Kline *et al. vs.* The British Queen Mining Company. Complaint. Filed Sep. 24, 1883. (Signed) Edward F. Bishop, clerk. Wells, Smith & Macon, att'ys for pl'ffs.

And the said summons is in the words and figures as follows, to wit:

feet to the southwest corner of said Baker lode; thence north thirty-nine degrees (39°) west fifty (50) feet to the place of beginning, containing one and eighty-four-hundredths (1.84) acres, in which said premises the plaintiffs had and have an estate in fee simple absolute; and those certain other premises known and described as mining claims numbers one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8) east from the discovery and mining claims numbers one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8) west from the discovery on the Baker Extension west lode; also those certain other premises known as the Baker Fraction lode, being one hundred (100) feet in length, more or less, along the vein of the said lode and lying westerly from the said Baker lode and between the same and the said Baker Extension west lode, all the said premises lying and being contiguous and being thirty-three hundred (3,300) feet in length, more or less, along the same lode or vein, situate on Kelso Mountain, Argentine mining district, in the county of Clear Creek and State of Colorado, and being the same premises in the year 1866 and in divers years thereafter until on or about the first day of August, A. D. 1879, occupied, possessed, and worked by the said plaintiff, The Baker Silver Mining Company, in which said last-mentioned mining claims situate on said Baker Extension west lode and the said Baker Fraction plaintiffs had and have the the right to occupy and possess the same by virtue of the location thereof as a mining claim in the public domain by divers citizens of the United States and by virtue of

4 divers conveyances thereof to the plaintiffs and a compliance by plaintiffs and their grantors with the acts of Congress, the laws of the State of Colorado, and the rules and regulations of the said mining district, and by right of the actual prior possession thereof by the plaintiffs and their grantors as a mining claim in the public domain of the United States; also one certain mill site, containing one and seventy-two-hundredths (1.72) acres of land, more or less, situate in the town or village of Bakerville, in Argentine mining district aforesaid, bounded and described as follows, to wit: Commencing at a post marked XX in a mound of stones at the confluence of Kelso creek and the South Branch of South Clear creek, from which a pine twelve (12) inches in diameter bears south sixty-nine degrees twenty-two minutes (69° 22′) east twenty-eight (28) feet, a pine seven (7) inches in diameter bears south forty-two degrees thirty minutes (42° 30′) west thirteen and eight-tenths (13.8) feet, Erwin's Peak bears south fourteen degrees (14°) west, variation fifteen degrees (15°) east; running thence south fifty-nine degrees one minute (59° 1′) east three hundred and sixty-three (363) feet to the northwest corner of said mill site, a post; thence north seventy-five dedegrees (75°) east two hundred and fifty (250) feet to the northeast corner of said mill site; thence south fifteen degrees (15°) east three hundred (300) feet to the southeast corner of said mill site; thence south seventy-five degrees (75°) west two hundred and fifty (250) feet to the southwest corner of said mill site, a post; thence north fifteen degrees (15°) west to the place of beginning, variation on all courses 15° 30′, being the same premises described by the surveyor

general of the United States for the district of Colorado as mineral survey number 54, together with the certain mill, boarding-house, shops, stable, and other tenements by the said plaintiff, The Baker Silver Mining Company, heretofore erected thereon; also the
5 certain premises known as lot number two (2), in block number eight (8), in the town of Georgetown, according to the official plat thereof, being fifty (50) feet in width, fronting on Hale street, and one hundred (100) feet in depth, with the buildings erected thereon; in which said mill site, lot, and premises last aforesaid plaintiffs had and have an estate in fee simple absolute.

And the said plaintiffs being so possessed of the said premises and entitled thereunto, the said defendant on, to wit, the 1st day of August, A. D. 1879, at the the said district, wrongfully entered therein and ousted the plaintiffs and hath ever since wrongfully withheld and still withholds from the plaintiffs possession thereof and of the whole thereof, with the rents, issues, and profits of the said premises, which the plaintiffs say for the time of defendant's said unlawful occupation thereof amounted to one hundred thousand dollars ($100,000), and in the said mining premises defendant, during such unlawful possession of the said premises, committed great waste and and mined, extracted, and carried away therefrom divers, to wit, ten thousand tons of ores bearing gold, silver, and other precious minerals, of great value, to wit, of the value of one hundred thousand dollars ($100,000), to the plaintiffs' damage in one hundred thousand dollars ($100,000).

Wherefore plaintiffs demand judgment against the said defendant for possession of the said premises and for one hundred thousand dollars ($100,000), its damages aforesaid, and its costs.

(Signed) WELLS, SMITH & MACON,
Plaintiffs' Attorneys.

6 (Endorsed:) 1341. C. C. Abraham Kline *et al. vs.* The British Queen Mining Company. Complaint. Filed Sep. 24, 1883. (Signed) Edward F. Bishop, clerk. Wells, Smith & Macon, att'ys for pl'ffs.

And the said summons is in the words and figures as follows, to wit:

Summons.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court of the United States for the District of Colorado.

ABRAHAM KLINE, CHARLES W. ARNY, THE BAKER SILVER MINING COMPANY, Plaintiffs,
versus
THE BRITISH QUEEN MINING COMPANY, Defendant.

Complaint. Filed in the Clerk's Office this 24th day of September, A. D. 1883.

The President of the United States of America to the British Queen Mining Company, Greeting:

You are hereby notified that an action has been brought in said court by Abraham Kline, Charles W. Arny, the Baker Silver
7 Mining Company, plaintiffs, against you as defendant, to recover the possession of certain specific real property situate in Argentine mining district, county of Clear Creek and State of Colorado, to wit, the Baker lode; also mining claims numbers one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8) east from the discovery; also mining claims numbers one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8) west from the discovery, on the Baker Extension west lode; also the Baker Fraction lode; also one certain mill site situate in the town or village of Bakersville: also lot two (2), in block eight (8), in the town of Georgetown, and also the sum of $100,000.00 damages, for the rents, issues, and profits of said premises and for committing great waste, and for mining, extracting, and carrying away large quantities of ore and mineral from said premises, as more fully set forth and described in the complaint filed herein and to which reference is here made, and for the costs of this suit.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service, and if you fail so to do the said plaintiffs will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit
8 court, at the city of Denver, in said district, this 24th day of September, A. D. 1883, and of the Independence of the United States the 108th year.

[Seal U. S. Cir. C't.]

(Signed) EDWARD F. BISHOP, *Clerk.*

Proof of Service.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

DENVER, *Sept. 26th, A. D.* 1883.

I hereby certify that I received the within writ on the 24th day of September, A. D. 1883, and that I served the same upon the said defendant, The British Queen Mining Company, by delivering a true copy thereof to Peter Yost, the general agent, cashier, and paymaster of said defendant, at the county of Clear Creek, in said district, which is the county in which the principal business of said defendant is carried on, on the 25th day of September, A. D. 1883.

This writ therefore returned executed, as the law directs, this 25th day of September, A. D. 1883.

(Signed) WALTER A. SMITH, *Marshal,*
By JOHN W. BELCHER,
Deputy Marshal.

(Endorsed:) Gen. No. 1341. Circuit court of the United States for the district of Colorado. Abraham Kline *et al.*, plaintiffs, *versus* The British Queen Mining Company, defendant. Summons. Filed this 26 day of Sept'r, A. D. 1883. (Signed) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. Wells, Smith & Macon, of Denver, attorneys for plaintiffs.

9 And afterwards and on, to wit, the 3rd day of November, A. D. 1883, came the said defendant, by Charles C. Post, Esq., its attorney, and filed in said court and in said cause its answer to the complaint herein.

And the said answer is in words and figures as follows, to wit:

Answer.

THE UNITED STATES OF AMERICA, }
State and District of Colorado. }

In the Circuit Court of the United States for the District of Colorado.

ABRAHAM KLINE & CHARLES ARNEY and THE BAKER SILVER MINING COMPANY, Plaintiffs,
vs.
THE BRITISH QUEEN MINING COMPANY OF COLORADO, Defendant.

The defendant, answering the complaint of the plaintiffs, denies—

I. That the Baker Silver Mining Company is a corporation organized & existing under the laws of the State of Pennsylvania or under any law, and denies that said Baker Silver Mining Company has any existence whatever, and denies that said pretended corporation plaintiff is a citizen of the State of Pennsylvania or of any State or at all.

10 II. Defendant admits that previous to the second day of August, A. D. 1879, said corporation plaintiff had an estate in fee simple absolute in and to the Baker Lode mining claim survey lot No. 53, as set forth in said complaint, but denies that said corporation plaintiff since last said date have had any right or title or possession or right of possession in or to said Baker lode survey lot No. 53.

III. Admits that prior to the second day of August, 1879, said corporation plaintiff was possessed of those certain premises described as the Baker Extension lode and the Baker Fraction lode, as set forth in said complaint, but denies that since last said date said corporation plaintiff has ever had any right or title or possession or right of possession in or to said Baker Extension lode or Baker Fraction lode or any part thereof.

IV. Admits that prior to the 2d day of August, 1879, said corporation plaintiff was possessed of the mill-site property described in said complaint as survey lot No. 54, as set forth in said complaint, but denies that — any time since last said date the said corporation plaintiff has had any right or title or possession or right of possession in or to said survey lot No. 54 or any part thereof.

V. Admits that prior to the second day of August, 1879, said corporation plaintiff was possessed of that certain lot No. 2, in block No. 8, of the town of Georgetown, as described in said complaint, but denies that at any time since last said date the said corporation plaintiff has had any right, title, or possession or right of possession in or to said lot No. two, in block No. 8, of Georgetown or any part thereof.

11 VI. Denies that on the 1st day of August, A. D. 1879, or at any other time (except as hereinafter set forth) entered into said premises; and denies the ouster of said plaintiffs from said premises; and denies the withholding of said premises from said plaintiffs (except as hereinafter set forth); and denies that there has been rents, issues, & profits arising from said premises in the sum of $100,000.00 or in any sum or at all; and denies the commission of waste in any degree upon said premises or at all; & (except as hereinafter stated) denies the mining and carrying away of ores from said premises; and denies that the plaintiff has been damaged in the sum of $100,000.00 or in any sum or at all.

For a second & further defence the defendant alleges that the plaintiffs Abraham Kline and Charles Arney never at any time or in any manner had and still do not have any right, title, or interest, claim or demand, possession or right of possession in or to the said premises or any part thereof.

And for a third and further defense the defendant alleges:

I. That on the second day of August, A. D. 1879, the Baker Silver Mining Company, one of the plaintiffs above named, ceased to exist as a corporation, and from last said date hitherto ceased to exercise and use any and all rights, privileges, & franchises which heretofore pertained to said Baker Silver Mining Company.

II. That heretofore, to wit, on the second day of August, A. D. 1879, the defendant's grantors became and were possessed of the

Baker lode, the same premises described in plaintiffs' complaint as survey lot number 53 and every part thereof, and also the certain mill site described in said complaint as mineral survey No. 54 and every part thereof, and also said lot described in said com-
12 plaint as lot No. 2, in block No. 8, of Georgetown, and acquired an estate therein and thereto in fee simple absolute, and that as to said Baker Extension lode and said Baker Fraction lode described in said complaint, the defendant's said grantors on the date last aforesaid became possessed of and acquired the same right of possession and title thereto and therein as the said corporation plaintiff had and held on said second day of August, A. D. 1879, and prior thereto.

III. That said defendant's grantors, upon said second day of August, A. D. 1879, became seized of all of said premises described in said complaint, and claimed the right and title thereto by purchase and by conveyance thereof through the said corporation plaintiff, and under such purchase and conveyance the defendant's said grantors went into possession of all of said premises upon said second day of August, A. D. 1879, and worked, mined, and occupied the same and every part thereof until the first day of April, A. D. 1882.

IV. That on said first day of April, A. D. 1882, the defendant became possessed of all of said premises by purchase and conveyance thereof by means of deeds of conveyance through said corporation plaintiff and its grantees, and the defendant upon said 1st day of April, A. D. 1882, under said several deeds of conveyance, entered into the possession of all of said premises and has ever since held, occupied, and enjoyed the same.

V. That the defendant holds and is possessed of an estate in all of said premises (except the said Baker Extension lode and the Baker Fraction lode) in fee simple absolute.

Where- defendant demands judgment for its costs.

(Signed) CHAS. C. POST,
Att'y for Defendant.

13 (Endorsed:) No. 1341. Kline & Arney and Baker S. M. Co. *vs.* The British Queen S. M. Company. Answer. Filed Nov. 3, 1883. (Signed) Edward F. Bishop, clerk. Chas. C. Post, Georgetown, Colo., att'y for def't.

And afterwards and on, to wit, the 6th day of November, A. D. 1883, came again the said plaintiffs, by their attorneys aforesaid, and filed in said court and in said cause their replication to the answer heretofore filed herein.

And the said replication is in words and figures as follows, to wit:

Replication.

In the Circuit Court of the United States for the District of Colorado.

ABRAHAM KLINE *et als.*
versus
THE BRITISH QUEEN MINING COMPANY.

The plaintiffs, for replication to the third defense in the answer of the said defendant contained, den*ies* that at the time in the said third defense mentioned or at any time the said defendant or its grantors became or were possessed of the said Baker Lode or the certain mill site in the complaint described or any part thereof or the said lot two (2), in block eight (8), in Georgetown, or acquired any es-
14 tate therein or in or to the said Baker Fraction lode.

Admit that at or about the time in the said answer mentioned the said defendant's grantors began to claim title to the said premises by purchase and conveyance thereof through the said corporation plaintiff and not otherwise, but deny that the said defendant's grantors or any of them in fact acquired any right or title to the said premises through the said corporation plaintiff or otherwise.

Deny that any such conveyance to the defendant's grantors or any of them was ever made by the said corporation plaintiff.

Deny that defendant's grantors or any of them ever made any purchase of the said premises or any part thereof from the plaintiff corporation.

Deny that defendant's grantors entered into possession of the said premises under any such pretended purchase or conveyance as in the said third defense mentioned.

Avers, on the contrary, that the entry of defendant's grantors into said premises was of their own wrong.

Denies that defendant became possessed of the said premises by means of any deeds of conveyance through the corporation plaintiff or its grantees. Denies that any such conveyance by the plaintiff corporation was ever made.

Denies that defendant is possessed of any estate whatsoever in the said premises in fee simple absolute or otherwise.

(Signed) WELLS, SMITH AND MACON,
Plaintiffs' Att'ys.

15 (Endorsed:) 1341. Abraham Kline *et al. vs.* The British Queen Mining Company. Replication to 3rd defense. Filed Nov. 6, 1883. (Signed) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 26th day of June, A. D. 1884, the same being one of the regular juridical days of the May term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Judgment.

ABRAHAM KLINE, CHARLES W. ARNY, THE BAKER SILVER MINING COMPANY *vs.* THE BRITISH QUEEN MINING COMPANY. } 1341. Action for Possession of Specific Real Property and for Damages.

At this day come the said plaintiffs, by Thomas Macon, Esq., their attorney, and the said defendant, by C. C. Post, Esq., its attorney, also comes.

And this cause now coming on to be tried by the court without a jury, pursuant to a written stipulation thereto herein filed, and the court having heard the evidence produced herein and the arguments of counsel, the said defendant moves the court for judgment of nonsuit as to the said plaintiffs, Abraham Kline and Charles W. Arny.

And the said plaintiffs, Abraham Kline and Charles W.
16 Arny, now here in open court consenting thereto, it is considered by the court that as to the matters and things alleged in the said complaint herein by the said plaintiffs, Abraham Kline and Charles W. Arny, the said defendant go hence hereof without day.

And thereupon the court doth find the issues herein joined for the said plaintiff, The Baker Silver Mining Company, and against the said defendant, and that the said plaintiff is the owner of and entitled to the possession of the premises described in the complaint.

Wherefore, on motion of the said plaintiff, it is ordered by the court that judgment be entered herein in favor of the said plaintiff, The Baker Silver Mining Company, and against the said defendant for the possession of the premises described in the complaint and the said plaintiff's costs, to be taxed; and let execution herein be stayed for twenty days from this day.

And thereupon and on the same day, to wit, the 26th day of June, A. D. 1884, judgment was duly entered against the said defendant in the judgment book of said court, in pursuance of the statutes and rules of court.

And the said judgment is in words and figures as follows, to wit:

Judgment.

17 THE BAKER SILVER MINING COMPANY, Impleaded with Abraham Kline and Charles W. Arny, *vs.* THE BRITISH QUEEN MINING COMPANY. } 1341. Action for Possession of Specific Real Property and for Damages.

On this 26th day of June, A. D. 1884, the same being one of the regular juridical days of the May term, A. D. 1884, of said court, there being present the Honorable Moses Hallett, district judge—

It is considered by the court that the said plaintiff, The Baker Silver Mining Company, do have and recover of and from the said defendant possession of the property, lands, and tenements in said complaint described, to wit, the Baker lode, being the same premises designated by the surveyor general of the United States for the district of Colorado as mineral survey number 53, the bounds whereof are as follows, to wit: Beginning at a monument on the summit of Kelso mountain, marked XX, established as an initial point to the survey of the Huldah lode, and from which monument Erwin's Peak bears south forty-six degrees twenty-one minutes (46° 21′) west, variation fifteen degrees thirty minutes (15° 30′) east; thence south forty-five degrees fifty-two minutes (45° 52′) east seven hundred and ninety-one (791) feet to the northwest corner of said Baker lode, from which Erwin's Peak bears south fifty-one degrees forty-five minutes (51° 45′) west, running thence north fifty-one degrees (51°) east sixteen hundred (1,600) feet to the northeast corner of said Baker lode; thence south thirty-nine degrees (39°) east fifty (50) feet to the southeast corner of said Baker lode;
18 thence south fifty-one degrees (51°) west sixteen hundred (1,600) feet to the southwest corner of said Baker lode; thence north thirty-nine degrees (39°) west fifty (50) feet to the place of beginning, containing one and eighty-four hundredths (1.84) acres; also those certain other premises known and described as mining claims numbers one (1), two (2), three (3), four (3), five (5), six (6), seven (7), and eight (8) east from the discovery and mining claims numbers one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8) west from the discovery on the Baker Extension west lode; also those certain other premises known as the Baker Fraction lode being one hundred (100) feet in length, more or less, along the vein of the said lode and lying westerly from the said Baker lode, and between the same and the said Baker Extension west lode, all the said premises lying and being contiguous and being thirty-three hundred (3,300) feet in length, more or less, along the same lode or vein situate on Kelso mountain, Argentine mining district, in the county of Clear Creek and State of Colorado; also one certain mill site containing one and seventy-two hundredths (1.72) acres of land, more or less, situate in the town or village of Bakerville, in Argentine mining district aforesaid, bounded and described as follows, to wit: Commencing at a post, marked XX, in a mound of stones at the confluence of Kelso creek and the south branch of South Clear creek, from which a pine twelve (12) inches in diameter bears south sixty-nine degrees twenty-two minutes (69° 22′) east twenty-eight (28) feet, a pine seven (7) inches in diameter bears south forty-two degrees thirty minutes (42° 30′) west thirteen and eight-tenths (13.8) feet, Erwin's Peak bears south fourteen degrees (14) west, variation fifteen degrees (15) east, running thence south
19 fifty-nine degrees one minute (59° 1′) east three hundred and sixty-three (363) feet to the northwest corner of said mill site, a post; thence north seventy-five degrees (75°) east two hundred and fifty (250) feet to the northeast corner of said mill site; thence south fifteen degrees (15°) east three hundred (300) feet to the south-

east corner of said mill site; thence south seventy-five (75°) degrees west two hundred and fifty (250) feet to the southwest corner of said mill site, a post; thence north fifteen degrees (15°) west to the place of beginning, variation in all courses 15° 30′ east, being the same premises described by the surveyor general of the United States for the district of Colorado as mineral survey number 54; together with the certain mill, boarding-house, shops, stable, and other tenements by the said plaintiff, The Baker Silver Mining Company, heretofore erected thereon; also the certain premises known as lot number two (2), in block number eight (8), in the town of Georgetown, according to the official plat thereof, being fifty (50) feet in width fronting on Hale street and one hundred (100) feet in depth, with the buildings erected thereon, and that the said plaintiff, The Baker Silver Mining Company, have a writ of possession therefor.

It is further considered by the court that the said plaintiff, The Baker Silver Mining Company, do have and recover of and from the said defendant its costs by it in this behalf laid out and expended, to be taxed, and have execution therefor twenty days from this day.

20 And afterwards and on, to wit, the 18th day of October, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Judgment Vacated.

ABRAHAM KLINE, CHARLES W. ARNY, THE BAKER SILVER MINING COMPANY *vs.* THE BRITISH QUEEN MINING COMPANY.	1341. Action for Possession of Specific Real Property and for Damages.

At this day comes the said defendant, by C. C. Post, Esq., its attorney, and moves the court that the judgment lately had herein be vacated and a new trial herein be had.

And it now appearing to the court that the taxed costs herein have been fully paid and discharged by the said defendant, therefore it is ordered that the judgment lately, and on the 26th day of June, A. D. 1884, had therein be vacated and for naught held, and that a new trial of the issues herein joined be had, pursuant to the statute in such case made and provided.

And afterwards and on, to wit, the 8th day of May, A. D. 1885, the same being one of the regular juridical days of the May term, A. D. 1885, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

21 *Order. Cause Continued.*

ABRAHAM KLINE *et al.* } 1341. Action for Possession of Specific Real Property, &c.
vs.
THE BRITISH QUEEN MINING COMPANY. }

At this day, upon stipulation filed herein, it is ordered by the court that this cause stand continued.

And afterwards and on, to wit, the 13th day of November, A. D. 1886, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial.

THEBAKER SILVER MINING COMPANY } 1341. Action for Possession of Specific Real Property and for Damages.
vs.
THE BRITISH QUEEN MINING COMPANY. }

At this day comes the said plaintiff, by J. G. Taylor, Esq., its attorney, and the said defendant, by F. W. Hankey, Esq., its attorney, also comes.

And this cause now coming on to be tried by the court without a jury, pursuant to a written stipulation thereto herein filed, the hearing of the evidence herein is continued to the hour of adjournment.

22 And afterwards and on, to wit, the 26th day of November, A. D. 1886, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial Continued.

THE BAKER SILVER MINING COMPANY } 1341. Action for Possession of Specific Real Property and for Damages.
vs.
THE BRITISH QUEEN MINING COMPANY. }

At this day come again the said parties, by their attorneys respectively.

And thereupon the hearing of the evidence herein is resumed, and the court, having heard the evidence produced herein and the arguments of counsel, doth take the same under advisement.

And afterwards and on, to wit, the 27th day of November, A. D. 1886, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Judgment.

THE BAKER SILVER MINING COMPANY *vs.* THE BRITISH QUEEN MINING COMPANY. } 1341. Action for Possession of Specific Real Property and for Damages.

23 At this day come again the said parties, by their attorneys respectively.

And this cause having heretofore come on to be tried by the court without a jury, pursuant to a written stipulation thereto herein filed, and the court having heard the evidence produced herein and the arguments of counsel, and having taken the same under advisement, and being now sufficiently advised in the premises, the court doth find the issues herein joined for the said plaintiff, The Baker Silver Mining Company, and against the said defendant, and that the said plaintiff, The Baker Silver Mining Company, is the owner of and entitled to the possession of the premises in the complaint described.

And thereupon the said defendant moves the court for judgment of nonsuit as to the said plaintiffs, Abraham Kline and Charles W. Arny.

And the said plaintiffs, Abraham Kline and Charles W. Arny, now here, in open court, consenting thereto, it is considered by the court that as to the matters and things in the said complaint herein alleged by the said plaintiffs, Abraham Kline and Charles W. Arny, the said defendant go hence hereof without day.

Wherefore, on motion of the said plaintiff, it is ordered by the court that judgment be entered herein in favor of the said plaintiff, The Baker Silver Mining Company, and against the said defendant for the possession of the premises as in the complaint herein described and the said plaintiff's costs, to be taxed.

And day until thirty (30) days from this day is allowed the said defendant to file herein its bill of the exceptions reserved by it upon the trial of the issues herein joined.

24 And thereupon and on the same day, to wit, the 27th day of November, A. D. 1886, judgment was duly entered against the said defendant in the judgment book of said court, in pursuance of the statutes and rules of court.

And the said judgment is in words and figures as follows, to wit:

Judgment.

THE BAKER SILVER MINING COMPANY *vs.* THE BRITISH QUEEN MINING COMPANY. } 1341. Action for Possession of Specific Real Property and for Damages.

At this day comes the said plaintiff, by Wells, McNeal and Taylor, its attorneys, and the said defendant, by Frederick W. Hankey,

its attorney, also comes; and the issues joined herein coming on to be tried by the court without a jury, in pursuance of the stipulation, in writing, of the parties filed herein, the court, having heard evidence produced as well by the said plaintiff as by the said defendant to maintain the issues joined herein, doth find the said issues for the said plaintiff, and that the said plaintiff, on the first day of August, A. D. 1879, was possessed of those certain premises known and described as "the Baker lode," designated by the surveyor general of the United States for the district of Colorado as mineral survey number fifty-three (53), the bounds whereof are as follows, to wit: Beginning at a monument on the summit of Kelso Mountain marked "XX," established as an initial point to the survey of the "Huldah lode," and from which monument Erwin's Peak bears south forty-six degrees twenty-one minutes (46° 21′) west, variation fifteen degrees thirty minutes (15° 30′) east; thence
25 south forty-five degrees fifty-two minutes (45° 52′) east seven hundred and ninety-one (791) feet to the northwest corner of said Baker lode, from which Erwin's Peak bears south fifty-one degrees forty-five minutes (51° 45′) west; running thence north fifty-one degrees (51°) east sixteen hundred (1,600) feet to the northeast corner of said Baker lode; thence south thirty-nine degrees (39°) east fifty (50) feet to the southeast corner of said Baker lode; thence south fifty-one (51°) degrees west sixteen hundred (1,600) feet to the southwest corner of said Baker lode; thence north thirty-nine degrees (39°) west fifty (50) feet to the place of beginning, containing one and eighty-four hundredths (1.84) acres; * * * also those certain other premises known and described as mining claims numbers one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8) east from the discovery, and mining claims numbers one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8) west from the discovery on the Baker Extension west lode; also those certain other premises known as the Baker Fraction lode, being one hundred (100) feet in length, more or less, along the vein of the said lode and lying westerly from the said Baker lode and between the same and the said Baker Extension west lode, all the said premises lying and being contiguous and being thirty-three hundred (3,300) feet in length, more or less, along the same lode or vein, situate on Kelso Mountain, Argentine mining district, in the county of Clear Creek and State of Colorado, and being the same premises in the year A. D. 1866 and in divers years thereafter until on or about the first day of August, A. D. 1879, occupied, possessed, and worked by the said plaintiff, The Baker Silver Mining Company;
26 also one certain mill site containing one and seventy-two hundredths (1.72) acres of land, more or less, situate in the town or village of Bakerville, in Argentine mining district aforesaid, bounded and described as follows, to wit: Commencing at a post, marked XX, in a mound of stones at the confluence of Kelso creek and the south branch of south Clear creek, from which a pine twelve (12) inches in diameter bears south sixty-nine (69°) degrees twenty-two (22′) minutes east twenty-eight (28) feet, a pine seven (7) inches in diameter bears south forty-two degrees thirty minutes (42° 30′)

west thirteen and eight-tenths (13.8) feet, Erwin's Peak bears south fourteen degrees (14°) west, variation fifteen degrees (15°) east; running thence south fifty-nine degrees one minute (59° 1′) east three hundred and sixty-three (363) feet to the northwest corner of said mill site, a post; thence north seventy-five degrees (75°) east two hundred and fifty (250) feet to the northeast corner of said mill site; thence south fifteen degrees (15°) east three hundred (300) feet to the southeast corner of said mill site; thence south seventy-five degrees (75°) west two hundred and fifty (250) feet to the southwest corner of said mill site, a post; thence north fifteen degrees (15°) west to the place of beginning, variation in all courses fifteen (15°) degrees thirty (30′) minutes east, being the same premises designated by the surveyor general of the United States for the district of Colorado as mineral survey number fifty-four (54), together with the certain mill, boarding-house, shops, stable, and other tenements by the said plaintiff, The Baker Silver Mining Company, heretofore erected thereon; also the certain premises known as lot number two (2), in block number eight (8), in the town of Georgetown, according to the official plat thereof, being fifty (50) feet in width fronting
27 on Hale street and one hundred (100) feet in depth, with the buildings erected thereon, being the same premises in the complaint mentioned.

And the court doth also find that the said plaintiff, at the time in the said complaint mentioned, to wit, on the first day of August, A. D. 1879, had and still hath an estate in fee simple absolute in and to the said "the Baker lode" and in and to the said mill site and in and to the said lot two (2), in block eight (8), in the town of Georgetown, as above described, and that in and to the several claims aforesaid upon the said Baker Extension west lode and in and to the said Baker Extension west lode and in and to the said Baker Fraction lode the said plaintiff at the time aforesaid had and at the institution of its said suit had and still hath the right to occupy and possess the same by virtue of the location thereof as mining claims in the public domain of the United States by divers citizens of the United States and by virtue of divers conveyances thereof to the plaintiff and compliance by the plaintiff and its grantors with the acts of Congress and the laws of the State of Colorado and the rules and regulations of the said mining district and the actual prior possession thereof by the plaintiff and its grantors as a mining claim in the public domain of the United States, and that defendant is guilty of the ouster of the plaintiff therefrom and of the unlawful withholding of the said premises, as in the complaint alleged, and that plaintiff by reason thereof hath sustained damages in one cent.

Wherefore it is considered by the court that the said plaintiff do have and recover from the said defendant the said premises, with the appurtenances, as above described, and the sum of one cent,
28 its damages aforesaid, in form aforesaid assessed, together with its costs in this behalf expended, taxed at — dollars, and that a writ of possession issue to the marshal directing him to put

the said plaintiff into immediate possession of the said premises, and let execution issue for the said damages and costs.

And afterwards and on to wit, the 4th day of January, A. D. 1887, came again the said defendant, by its attorney aforesaid, and filed in said court and in said cause its bill of the exceptions reserved by it upon the trial of the issues herein joined.

And the said bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA, }
State and District of Colorado. }

In the Circuit Court of the United States for said District.

ABRAHAM KLINE, CHARLES ARNEY, THE BAKER SILVER MINING COMPANY, a Corporation, Plaintiffs,
vs.
THE BRITISH QUEEN MINING COMPANY OF COLORADO, Defendant. } Ejectment.

29 Be it remembered that said cause coming on for trial at the November term, A. D. 1886, of said court, the parties thereto, by their respective counsel, filed their stipulation in writing waiving a jury trial; and thereupon trial was had to the court without a jury.

Be it further remembered that on the trial of this cause, in this term, the defendant gave in evidence on his behalf as follows—that is to say:

A certified copy of a judgment rendered by the district court of Colorado in and for the first judicial district, sitting in the county of Clear Creek, which certified copy was in the following words and figures as follows, to wit:

"STATE OF COLORADO, }
County of Clear Creek, } *ss:*

"In Vacation before January Term.

"Pleas in the district court of the first judicial district of the State of Colorado in and for the county of Clear Creek, in vacation, before the January term, 1880, to wit, on the 9th day of July, A. D. 1879.

"CHARLES W. BETTS, Plaintiff,
vs.
"BAKER SILVER MINING COMPANY, Defendant.

"Be it remembered that heretofore, to wit, on July 9th, A. D. 1879, proceedings were had in the above-entitled cause and entered of record in said court as follows, to wit:

30 "In Vacation before January Term, 1880.

"CHARLES W. BETTS, Plaintiff,
vs.
"BAKER SILVER MINING COMPANY, Defendant. } 2160.

"*Judgment by Default by Clerk.*

"In this action, the defendant having been regularly served with process and the legal time for answering plaintiffs' complaint herein having expired and no answer or demurrer thereto having been filed, the default of the said defendant in the premises having been duly entered according to law, now, at this day, an application of said plaintiff, by Jacob Fillius, Esq., his attorney, to the clerk, judgment is entered in accordance with the prayer of said complaint.

"Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged, and decreed that Charles W. Betts, plaintiff, do have and recover from the said defendant, The Baker Silver Mining Company, the sum of four thousand two hundred twenty-nine and $\frac{33}{100}$ ($4,229.33) dollars with legal interest thereon, together with plaintiffs' costs and disbursements incurred in this action, amounting to the sum of 11.84.

"Entered July 9th, 1879.

"Afterwards, to wit, at the January term, A. D. 1880, of said court, there being present—

"Hon. Thomas Mitchell, judge; H. M. Orohood, district attor-attorney; T. Jeff. Watts, sheriff; H. H. Atkins.

31 "Proceedings were had in said cause and entered of record in said court on, to wit, the 8th day of January, as follows, to wit:

"CHARLES W. BETTS
vs.
"BAKER S. M. COMPANY. } 2160.

"This day, on motion of Jacob Fillius, Esq., his attorney, this cause is placed upon the docket, and it is ordered by the court that the clerk correct the error in the assessment of damages in this cause, and that he amend the judgment entered in this cause July 9th, 1879, accordingly.

"And thereupon said judgment was duly entered as follows, to wit:

"CHARLES W. BETTS, Plaintiff,
vs.
"BAKER SILVER MINING COMPANY, Defendant. }

"In this action the defendant having been regularly served with process, and the legal time for answering plaintiff's complaint herein having expired, and no answer or demurrer thereto having been filed, the default of the said defendant in the premises having been

duly entered according to law: Now, at this day, on application of said plaintiff, by Jacob Fillius, Esq., his attorney, to the clerk, judgment is entered in accordance with the prayer of said complaint.

"Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged, and decreed that Charles W. Betts, plaintiff, do have and recover from the said defendant, The Baker Silver Mining Company, the sum of four thousand nine hundred seventy-four $\frac{66}{100}$ ($4,974.66) dollars, with legal interest thereon, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of $11.84.

"Judgment entered this 9th day of July, A. D. 1879.

"H. H. ATKINS, *Clerk.*

"STATE OF COLORADO,
"*County of Clear Creek,* } ss:

"In District Court.

"CHARLES W. BETTS, Plaintiff,
vs.
"BAKER SILVER MINING COMPANY, Defendant. } 2160.

"I, H. H. Atkins, clerk of the district court of Clear Creek county, in the first judicial district of the State of Colorada, do hereby certify the above and foregoing to be true and perfect copies of the entry of judgment in said cause, the order directing the amendment of said judgment, as amended, as the same now appears of record in my office.

"Attest my hand and the seal of said court, at Georgetown, this 30th day of Oct., A. D. 1883.

"H. H. ATKINS, *Clerk.*"

To the introduction of which said certified copy the plaintiff objected, for the reason that it did not appear that said court had jurisdiction to render the said judgment; and thereupon the court reserved said objection until all of the evidence in the case could be introduced.

The defendant then offered in evidence a certified copy of an execution *fieri facias* sued out of said court upon said judgment on the 9th day of July, 1879, directed to the sheriff of said county, together with the return of the sheriff thereon, to show that he had levied the same on the 2nd day of August, 1879, upon the property in controversy in this suit, and that the same was sold to Charles W. Betts to the satisfaction of said judgment and costs, the return thereon being dated September 10th, 1879, and tending to show that the levy and sale was made in accordance with the statutes of Colorado; to which the same objection was made as before and the same reservation by the court.

Defendant then offered in evidence certificate of levy under said execution to show levy upon the property involved in this cause under said execution, and that said levy was recorded July 10th, 1879, in the recorder's office of Clear Creek county, Colorado; to

which the same objection was made as before and the same reservation by the court.

Defendant then offered in evidence a certificate of sale to show the sale by the sheriff of the said county, representing the plaintiff, The Baker Silver Mining Company, of the property involved in this suit to Charles W. Betts, executed August 2nd, 1879; to which the same objection was made as before and the same reservation by the court.

Defendant then offered in evidence a certified copy of a sheriff's deed to show that on the 3rd day of May, 1880, the sheriff of said
eounty executed to Charles W. Betts a sheriff's deed in con-
34 sideration of the sum of four thousand dollars to the property involved in this suit; to which the same objection was made as before and the same reservation by the court.

Defendant then offered in evidence a certified copy of a warranty deed to show that on the 5th day of October, 1880, Charles W. Betts deeded by deed of warranty to Marcus P. Bennett, in consideration of the sum of eight thousand dollars, the property involved in this suit; to which the same objection was made as before and the same reservation by the court.

Defendant then offered in evidence a certified copy of a power of attorney to show that on the 7th day of October, 1880, Marcus P. Bennett authorized, by his good and lawful power of attorney, the said Charles W. Betts, to grant, bargain, sell, remise, release, convey, and quitclaim to whom and upon such terms as said Charles W. Betts might deem proper all his right, title, and interest, estate, claim, and demand, both in law and in equity, as well in his possession as in expectancy, of, in, and to all mining locations, mining claims, or mining property of whatever sort, with the appurtenances thereto, then owned by him in the county of Clear Creek and State of Colorado; to which the same objection was made as before and the same reservation by the court.

Defendant then offered in evidence certified copy of a deed to show that on the 9th day of July, 1881, Charles W. Betts and Marcus P. Bennett executed and delivered a good and sufficient deed to William Dunlap of all the property involved in this suit; to which the same objection was made as before and the same reservation by the court.

Defendant then offered in evidence a certified copy of a deed to show that on the 4th day of April, 1882, William Dunlap executed
his good and lawful deed of all the property involved in
35 this suit to the British Queen Mining Company, defendant herein, for good and valuable consideration; to which the same objection was made as before and the same reservation by the court.

Defendant then offered in evidence deposition of William H. Giese, of the city of Philadelphia, State of Pennsylvania, to show that in the year 1879 said Giese was employed in the secretary's office of The Baker Silver Mining Company, the plaintiff, and that John I. McDuffy was during said year a stockholder in said Baker Silver Mining Company and owned stock therein; also deposition of Mr.

John I. McDuffy, of Philadelphia, Pennsylvania, to show that in the year 1879 said McDuffy was a stockholder in the plaintiff, The Baker Silver Mining Company; that during said year he was residing in the State of Colorado and engaged in the practice of law and in mining; that he knew of a suit brought by Charles W. Betts against the Baker Silver Mining Company about June 28th, 1879, in Clear Creek county, Colorado; that service was had on the company through him as a stockholdea, in the absence of agent, cashier, president, or other officer; to which the same objection was made as before and the same reservation by the court.

The said McDuffie testified on cross-examination that he was unable at the time of giving his said deposition to recall just what the claim of Betts was; that he knew Betts had a claim before the writ was served on him, because he was the owner of certain negotiable instruments of the Baker Silver Mining Company—bonds secured by a mortgage of the company; knew 30 days before the writ was served that he had these bonds; that he, witness, might have been instrumental in putting the bonds in his possession; that
he did not know he would be served with the writ before it
36 was served; that Betts purchased the bonds of witness some
time prior to the bringing of the action, couldn't say how long; there were $3,200 worth in all; that witness had purchased the bonds of various parties for cash; $1,200 of Catherine Oberly, for which he paid $40, & that he could not recollect others; that he got bonds from Bower, but they were not included in this action, & he couldn't recall any other person to whom he paid cash for the bonds.

Thereupon the defendant called Mr. R. D. WEISER, who testified on behalf of the defendant as follows:

Direct examination by Mr. HANKEY:

Q. Where do you reside?
A. In Georgetown, Colo.
Q. How long have you lived there?
A. Since 1873.
Q. Are you acquainted with the Baker Silver Mining Company, an organization of the State of Pennsylvania, owning property at Georgetown, called the Baker mine and extension?
A. I am acquainted with the property.
Q. Were you acquainted with the company—the officers?
A. A part of them.
Q. How long did you know the Baker Company?
A. Oh, for several years.
Q. Did you know them in the years 1878 and 1879?

Objected to as there were no averments with reference to the matter in the pleadings.

37 COURT: We will consider these matters after we have heard the testimony, and then you can insist on your objection.

Q. State whether or not in the year 1878 you had any business dealings with the Baker Silver Mining Co.
A. Yes, sir; I did.
Q. What was the cha-cter?
A. I had a lease on the property.
Q. On the property of theirs in Clear Creek county?
A. On the Baker silver mine.
Q. From whom did you receive that lease?
A. I received it from the Baker Silver Mining Company.
Q. Through what officer?
A. The secretary and treasurer.
Q. What was the name?
A. John Weist.
Q. Where was that lease executed?
A. In Georgetown.
Q. Mr. Weist was there at that time?
A. Yes, sir.
Q. What time was that, if you remember?
A. It was in August—the 10th of August, 1878.
Q. Will you examine this certified copy and see if you were the party mentioned in that lease as lessee (handing document to witness)?
A. This seems to be a copy of the lease.
Q. You are the person mentioned there?
—. Yes, sir.
Q. State whether or not you operated the Baker mine under
38 this lease.
A. I did.
Q. During the years 1878 and 1879?
A. During the year 1878 and a part of 1879.
Q. What part of 1879?
A. The first time.
Q. Up to what time?
A. Up to August 4th.
Q. State whether or not you made improvements on the property in the way of development.
A. Well, we were working the lease and there was no particular development. The property was developed largely—we were stoping.
Q. Any machinery put — it?
A. Yes, sir.
Q. Water taken out of the mine?
A. Yes, sir.
Q. Drifts driven, shafts sunk?
A. No; no shafts sunk. We took the water out of the deep shaft and drifted a little to the east.
Q. Was ore extracted from the mine?
A. Yes, sir; some.
Q. What disposition was made of that proportion of the proceeds that was due to the company under the lease?
A. I presume it was paid to them.
Q. Was it paid in accordance with the directions of the lease?

A. Not entirely so.
Q. Was it partially?
A. Yes, sir; to some extent.
39 Q. State whether or not you followed out the directions of the lease with reference to the payment of the royalty to the former agent of the company.
A. Yes. I paid a part of the proceeds to my father, who had a claim against them.
Q. And you operated the mine up to August 4th, 1879?
A. Yes.
Q. Had your father formerly been agent of the company?
A. He had.
Q. In Georgetown?
A. Yes, sir.
Q. Up to what time?
A. I think he resigned in 1878—about the 10th August.
Q. Did the Baker Silver Mining Company have any agent or president or secretary in the State of Colorado after that time?
A. Not to my knowledge.
Q. You were living there and operating the property in 1879?
A. Yes, sir.
Q. And there was no agent there, that you could discover?
A. No.
Q. How long had you known the Baker Company prior to the execution of this lease to yourself?
A. I think I became acquainted with them in 1876.
Q. Do you knew whether they ever operated the Baker property in any other way except by lease during that time?
A. Yes, sir. During—from that—from 1876?
Q. Yes, sir.
A. No, sir; I believe not.
40 Q. And from 1876 to 1878 your father, Professor Weiser, operated the company?
A. Yes, sir.
Q. And they operated most of that time through leases?
A. Yes, sir; most of that time. They allowed one man a little money to run a cross-cut.
Q. Were you acquainted with John I. McDuffy?
A. I was.
Q. What time did you meet Mr. McDuffy?
A. In the spring of 1879.
Q. Where?
A. In Georgetown.
Q. Did you understand why Mr. McDuffy was there?
A. Yes, sir; after he had been there a short time I did.
Q. State what.
A. Well, he told me that he came to Colorado in the interest of the Baker Silver Mining Co., particularly in the interest of the bond-holders.
Q. Did he ever exhibit to you any evidences of authority from the Baker Silver Mining Company?

A. My mind is not clear on that subject. I am inclined to think he had a power of attorney from the Baker Silver Mining Company.

Q. Did you recognize him as agent?

A. I took him through and showed him the property.

Q. Was there any one else during the term of the lease from the company in the State of Colorado who ever assumed to direct or take an interest in its affairs?

A. No, sir; not, except John Weist, in 1878.

Q. But from that time to the time of your lease?

41 A. No, sir.

Q. You say that you operated under that lease until about the 4th August, 1879?

A. Yes, sir.

Q. And that portion of the royalty due the company was paid, according to the directions of the lease, to Professor Weiser?

A. Yes, sir.

Cross-examination by Mr. TAYLOR:

Q. How many leases did you ever have on this property?

A. I had two—no, three.

Q. Had three? When did you get the first one?

A. It was made on the 15th day of May, 1878.

Q. That was the first one?

A. Yes, sir.

Q. Why was another one made in August of the same year?

A. The first was made by my father to me for three years.

Q. Who was then acting as the agent?

A. He was their agent. It was signed by him as agent, and when the secretary of the company came to this country he objected to the time of that lease—the length of it—and I agreed to take one for a short time.

Q. Then the one in May was cancelled when the one in August was made?

A. It never was cancelled, except by the signing of this other lease.

Q. But it was cancelled by the understanding?

A. Yes, sir.

Q. When did you get the third lease? You say this was the second.

42 A. It was afterwards—a lease by Mr. McDuffy.

Q. You got a lease from Mr. McDuffy?

A. Yes, sir.

Q. When was that?

A. On the 4th August, 1879.

Q. How did it happen that Mr. McDuffy made you a lease in 1879 when this purports to run for two years?

A. I agreed with Mr. McDuffy to transfer my lease from the Baker Silver Mining Company to him under certain conditions, which I did.

Q. Did you know of this suit by Mr. Betts against the company?

Objected to as immaterial.

A. Yes, sir.

Q. From whom did you get the information about the suit?

Objected to as immaterial and irrelevant. Objection overruled.

Q. From whom did you learn of the suit of Betts against the company?

A. From Mr. McDuffy himself.

Q. You had several talks with McDuffy about the time of the suit?

A. I did, sir.

Q. Are you sure whether he had a power of attorney from the Baker Silver Mining Company or the bondholders?

A. As I stated before, my mind is not quite clear on that subject. It occurs to me he had a power of attorney from the Baker Silver Mining Company.

Q. You are not positive, however?

A. I am not.

43 Q. You are certain that Mr. McDuffy assumed to be representing the bondholders?

A. Certainly, sir.

Q. Why was it that Mr. McDuffy substituted the third lease for this one?

A. Well, I do not know, sir.

Q. What was the conversation between you with reference to that? In what capacity was he acting then?

A. The lease was made after he had sued the company and got a judgment.

Q. That is, this Betts judgment?

A. Yes, sir.

Q. What did McDuffy have to do with the judgment Betts had acquired against the company?

Objected to as immaterial. Objection sustained.

Q. Have you got the lease that was substituted, the third lease?

A. Yes, sir.

Q. Let me see it. (Witness handed paper to counsel.) This was the lease that Mr. McDuffy and you made on the 4th of August, when this other lease (indicating) was abandoned?

A. No, sir; that lease was not abandoned, only by me. I transferred that lease to McDuffy and took this one in place of it.

Q. You transferred this one to him?

A. Yes, sir,

Q. He here is acting as agent of Charles W. Betts?

A. Yes, sir.

Q. Did you ever have any conversation with Mr. Betts about it?

A. No, sir; I did not.

Q. Mr. McDuffy was acting for Betts entirely in this matter?

44 A. Yes, sir.

Q. What did he say to you with reference to the cancellation of this lease or the exchange of these leases?

Objected to as immaterial. Objection overruled.

Q. Was it what Mr. McDuffy said that induced you to operate the mine under this lease? I understand whatever you did at that time you did under this lease?

A. Yes, sir.

Q. What was the conversation that passed between you that induced you to take this lease?

A. Mr. McDuffy told me when he first came to Georgetown or soon after he got there what his business was, and that he intended to sue the Baker Silver Mining Company and foreclose the bonds, as I understood him, and that he would include me in the suit—would have to include me as lessee—and, after some talk of that nature, finally threatened to get an injunction against me restraining me from working the property, and after some conversation he made the proposition that if I would transfer my case to him and take from him there would be no trouble between him and me. I, in return, said that if he would go on, attach the property and sell it, at the end of the time which was required by law to advertise it if the Baker Silver Mining Co. did not come in and redeem the property I would transfer my lease to him and take from him, which transaction was made on the 4th of August, 1879, as that deed shows.

Q. And you understood that this suit which he threatened against the Baker Silver Mining Company had occurred in this suit of Mr. Betts; that that was the suit McDuffy had threatened the company with and the proceedings he had threatened you with; that this suit of Betts was that proceeding?

45 A. Yes, sir; he told me he would bring it in the name of Charles W. Betts against the company.

Q. The company, outside of this lease, was doing no business and represented by no one in this State?

A. No, sir.

Q. This lease constituted the entire operation of the company in the State, so far as you know?

A. Yes, sir; so far as I know.

Q. After making this lease for a period of two years Mr. Weist, the secretary, returned to Philadelphia?

A. Yes, sir.

Redirect examination by Mr. HANKEY:

Q. You operated under that lease until the 4th August?

A. Yes, sir; until the 4th August, 1879.

Q. Did you know Mr. Charles W. Betts?

A. I did not.

Q. Do you know whether he was there in Georgetown?

A. No, sir; I do not know positively. I do not think he was. I did not see him and had no conversation.

Q. Then this transaction that you speak of, the substitution as it is called by cancelling of this lease by Mr. McDuffy, this occurred

after August 4th, 1879, and after Mr. Betts had obtained judgment against the Baker Company and the property had been sold?

A. It occurred on the 4th of August, I believe; that is the date of the lease.

COURT: Let me understand; this second lease was made here in Colorado?

A. It was made in my office, in Georgetown.

46 COURT: Mr. Weist was then secretary, was he?

A. Secretary and treasurer.

Whereupon defendant offered in evidence a certified copy of a lease tending to show that in the year 1878 the plaintiff, The Baker Silver Mining Company, by John Weist, secretary and treasurer, made and executed to R. B. Weiser, the witness last produced, a lease of the property involved in this suit, running for the term of two years, granting the right to said Weiser to enter into and upon said property and mine the same, to pay the royalties that should become due to the said company to the former agent of said company, at Georgetown, Clear Creek county, Colorado, in satisfaction of a claim for services against the company; said lease also tending to show said Weiser should report monthly all his proceedings under said lease to the secretary of the company, so long as said company should have no agent in the State of Colorado; also tending to show that the said lessee was authorized to deduct from the gross proceeds of working the mine the cost of hauling the ore therefrom to the mill in Georgetown; to the introduction of which said lease the same objection was made as before and the same reservation by the court.

The defendant then offered in evidence a certificate of the secretary of State of Colorado tending to show that upon careful examination of the records in his office he could discover no certificate of the Baker Silver Mining Company or record thereof, nor any

47 appointment designated of an authorized agent of said company in the State of Colorado upon whom process might be served, save and except a certificate of the Baker Silver Mining Company of Colorado, filed in the year 1880; to which the same objection was made as before and the same reservation by the court.

Defendant here rested.

Whereupon plaintiff offered in evidence a lease to show that on the 4th day of August, 1879, Mr. John I. McDuffy executed a lease to R. B. Weiser of the premises involved in this suit, which was objected to by defendant as irrelevant and immaterial, and the court reserved his objection until finally argued.

Whereupon the plaintiff called Mr. CHARLES W. BETTS, who testified on behalf of the plaintiff as follows:

Direct examination by Mr. TAYLOR:

Q. Were you acquainted with John I. McDuffy?
A. I was.
Q. What is your full name?

A. Charles W. Betts.

Q. Are you the Charles W. Betts who obtained a judgment in 1879 against the Baker Silver Mining Company?

A. So I was told by McDuffy.

Q. Did you hold a bond, the basis on which that suit was brought?

Objected to as immaterial.

Q. Who owned those bonds that were sued upon?

A. McDuffy came here and gave them to me and said they were my property, and I accepted them as an act of friendship.

48 Q. What did he state to you about the suit?

A. Yes, sir; he wanted to bring it in my name; it was necessary for me to be a bondholder.

Q. Did you understand that you owned the bonds or that McDuffy owned them?

Objected to as immaterial. Objection overruled.

A. I understood I owned the bonds for the time being; that they were not my individual property for all time.

Q. You did not understand that you had any beneficial interest?

A. No, sir.

Q. Did you understand the bonds were put in your name for the purpose of bringing the suit against the company?

A. Yes.

Q. Did you understand McDuffy was to derive the benefit of the suit?

A. Yes, sir.

Q. Did he derive the benefit of it?

A. Yes, sir; if there was any benefit he got it.

Q. Did you ever have the management of the property?

A. Never did.

Q. So far as looking after it?

A. Never did.

Q. Did you ever have any management of it?

A. I cannot say that I ever did.

Q. Who managed the suit and looked after it?

A. Mr. McDuffy.

Q. You did not do it?

A. No, sir.

Cross-examination by Mr. HANKEY:

49 Q. Why cannot you say whether you received any benefit from that or not?

A. When Mr. McDuffy transferred the property I signed the deed, and at that time he owed me some money, and he not only paid me that but a trifling sum over.

Q. Then did you enter into a fraudulent undertaking for the purpose of having this property sold out by Mr. McDuffy?

Objected to as immaterial. Objection sustained.

Q. What did you receive this money for?
A. As I stated to you, I received it in payment of a debt. He owed me some trifling amount, and at that time, when the deed was signed, he paid me a trifling sum—one or two hundred dollars.
Q. When was that?
A. I should say it was some time in 1879 or 1880.
Q. Was it after the judgment was rendered?
A. After the judgment was rendered.
Q. And the property sold?
A. And the property sold.
Q. You are referring now to your deed to Dunlap, I suppose?
A. I do not recollect now justly; I suppose it was to Dunlap.
Q. How long did you know the Baker Silver Mining Company?
A. I knew of its existence through McDuffy. I have never seen it; never been on the ground.

Redirect examination by Mr. TAYLOR:

Q. You say you were never on the ground?
A. I never went to the mine; never took any interest in it.
Q. McDuffy looked after all that?
A. Yes, sir.

50 Further cross-examination by Mr. HANKEY:

Q. You never had any conversation with the defendant in this suit, The British Queen Company, or any of its officers?
A. No; not that I recollect.

Whereupon the plaintiff rested, and the court thereafter and during the said term made the following finding of facts and judgment thereon:

"In the case of The Baker Silver Mining Company *vs.* The British Queen Mining Company I have reached the conclusion that judgment must be for the plaintiff. The judgment under which defendant claims title is of no force or validity for want of service on plaintiff in that suit. It is contended that plaintiff was at the time of service of process engaged in business in the State or had an agent here acting as the representative of the company. This is according to the rule given in St. Clair *vs.* Cox, 106 U. S. Supreme Court Reports. In that court the decision was that a corporation must have been engaged in business and the agent on whom service was made must have a representative character in the State at the time of such service in order for the court to have jurisdiction of the parties, and there it is stated that the facts relating to jurisdiction must appear of record. The language of the court is:

"'Without considering whether authorizing service of a copy of a writ of attachment as a summons on some of the persons named in
51 the statute—a member, for instance, of a foreign corporation; that is, a mere stockholder—is not a departure from the principle of natural justice mentioned in Lafayette Insurance Co. *vs.* French, which forbids condemnation without citation, it is

sufficient to observe that we are of opinion that when service is made within the State upon an agent of a foreign corporation it is essential, in order to support the jurisdiction of the court, to render a personal judgment that it should appear somewhere in the record, either in the application for the writ or accompanying its service or in the pleadings or the findings of the court, that the corporation was engaged in business in the State. The transaction of business by the corporation in the State, general or special, appearing, a certificate of service by the proper officer on a person who is its agent would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another State, to show that the agent stood in no representative character to the company; that his duties were limited to those of a subordinate employee or to a particular transaction, or that his agency had ceased when the matter in suit arose.'

"In this case defendant did not follow the suggestions made in St. Clair *vs.* Cox, that the facts establishing jurisdiction must appear in the record. I have allowed the parties to show by oral testimony whether plaintiff corporation at the time of the suit of Betts *vs.* the plaintiff was engaged in business in this State, the record being silent upon that subject. Defendant has offered evidence to the effect that in August, 1878, plaintiff company entered into a
52 lease with R. B. Weiser respecting this property, by which Weiser was to be permitted to go on and work the property for two years thereafter. This lease was made by the secretary of the company, who, it seems, was then in the State on some affairs of the company. It appears he went away immediately after making the lease and there was no agent left within the State after his departure. It appears affirmatively in the lease that there was no such agent in the State. The lease contained a covenant on the part of the lessee so long as the Baker Silver Mining Company had no authorized agent in Colorado to furnish a financial statement and report of the progress in the development of the mine every thirty days to the secretary of the Baker Silver Mining Company. It does not say where this report was to be furnished, but as the secretary resided in Philadelphia it was to be sent to him there, probably. Now, if the making of this lease was carrying on business to any extent, of which there cannot be much doubt, that occurred on the 10th day of August, 1878. Process was served in this case in the following year, June, 1879. The position of the defendant is that it must be taken the company was carrying on business during all the term of this lease within this State. I cannot accept that view. It might have been a lease for ninety-nine years, as is often the case. It would hardly commit the company to a personal presence within this State during all that time, the company being a foreign corporation. Defendant also attempted to show that McDuffy, the stockholder upon whom the process was served, was engaged in business for the company, for and on behalf of the plaintiff, at the time process was served, but it appears clearly enough he was here for the

purpose of instituting a suit against the company upon which
53 this judgment was obtained, and was acting in hostility to the company rather than as its agent at the time the process was served. Upon the considerations and upon the authorities I am of opinion that the judgment in Betts *vs.* plaintiff is void and the plaintiff is entitled to have possession of the premises."

And thereupon the court found the issues in said cause for the plaintiff, and rendered and entered judgment for the plaintiff for the possession of the premises sued for in said suit; to all of which defendant excepted.

Whereupon the defendant, by his counsel, then and there excepted to the entering of said judgment.

And forasmuch as the matters above set forth do not fully appear of record the defendant tenders this his bill of exceptions, and prays that the same may be signed and sealed by the judge of this court pursuant to the statute in such case made, which is accordingly done this 4 day of January, A. D. 1887.

(Signed) MOSES HALLETT, [SEAL.]
Dist. Judge.

(Endorsed:) No. 1341. U. S. circuit court. Abraham Kline *et al. vs.* The British Queen Mining Company. Bill of exceptions. Filed Jan. 4, 1887. (Signed) Edward F. Bishop, clerk. Frederick W. Hankey, att'y for def't, Denver, Colo.

54 And afterwards and on, to wit, the 9th day of February, A. D. 1887, came again the said defendant, by its attorney aforesaid, and filed in said court and in said cause its bond and sued out of said court a writ of error and citation to the Supreme Court of the United States.

And the said bond is in words and figures as follows, to wit:

Bond.

UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents that The British Queen Mining Company, as principal, and L. R. Evans and Alexander Miller, as sureties, are held and firmly bound unto The Baker Silver Mining Company in the full and just sum of five hundred dollars, to be paid to the said Baker Silver Mining Company; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8 day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at the November term, A. D. 1886, of the circuit court of the United States for the district of Colorado, in a suit pending in the said court between said Baker Silver Mining Company and The British Queen Mining Company, defendant, judgment was rendered against the said British Queen Mining Company, and said defend-

ant having obtained a writ of error to reverse the judgment of the said court and a citation directed to the said Baker Silver Mining Company, citing and admonishing it to be and appear at the Supreme Court of the United States to be held at Washington
55 on the tenth day of October next:

Now, the condition of the above obligation is such that if the said British Queen Mining Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make good said plea, then the above obligation to be void; else to remain in full force and virtue.

(Signed)	HERMAN BURGIN, *President.*	[SEAL.]
"	P. W. JANEWAY, *Secretary.*	[SEAL.]
"	L. R. EVANS.	[SEAL.]
"	ALEX. MILLER.	[SEAL.]

Approved.
(Signed) MOSES HALLETT,
District Judge.

[Seal Dist. C't.]

Justification.

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

L. R. Evans and Alexander Miller, sureties on the within bond, being each first duly sworn, deposes and saith that he is worth in real estate the sum below set opposite his name—that is to say—

As to Alexander Miller, one thousand dollars;

As to L. R. Evans, one thousand dollars—

over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

(Signed) L. R. EVANS.
" ALEX. MILLER.

56 Subscribed and sworn to before me, at Denver, this eighth day of February, A. D. 1887.

(Signed) EDWARD F. BISHOP,
Clerk District Court U. S.,
By F. W. TUPPER,
Deputy Clerk.

[Seal Dist. C't U. S.]

(Endorsed:) Gen. No. 1341. Circuit court of the United States, district of Colorado. Abraham Kline *et al. vs.* The British Queen Mining Company. Bond, $500. Filed this 9 day of Feb., A. D. 1887. (Signed) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk.

And the said writ of error, with the return of the clerk thereto, is next hereto attached, to wit:

Writ of Error.

57 Writ of error to circuit court U. S., district of Colorado.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

The President of the United States to the judge of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, between Abraham Kline, Charles Arney, and The Baker Silver Mining Company and The British Queen Mining Company of Colorado, a manifest error hath happened, to the great damage of the said British Queen Mining Company of Colorado, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at Washington, D. C., together with this writ, so that you have the same at Washington on the tenth day of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said *circuit* Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this ninth day of February, in the year of our Lord one thousand eight hundred and — seven, and of the Independence of the United States the 111th year.

Seal United States Circuit Court, District of Colorado.

EDWARD F. BISHOP, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Allowed by—
MOSES HALLETT,
District Judge.

[Endorsed:] Gen. No. 1341. Circuit court of the United States. The British Queen Mining Company, plaintiff in error, *vs.* Abraham Kline, Charles Arney, & The Baker Silver Mining Company. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 9 day of Feb., A. D. 1887. Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. Frederick W. Hankey, attorney for plaintiff in error, Denver, Colo.

Return.

THE UNITED STATES OF AMERICA, *District of Colorado,* } ss.:

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Seal United States Circuit Court, District of Colorado.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 27th day of August, A. D. 1887.

WILLIAM A. WILLARD, *Clerk.*

58 And the said citation is next hereto attached, to wit:

Citation.

59 Citation, U. S. Circuit Court.

UNITED STATES OF AMERICA, *District of Colorado.* }

The United States of America to the Baker Silver Mining Company and Messrs. Wells, McNeal & Taylor, its solicitors, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the tenth day of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, wherein The British Queen Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 9 day of Feb'y, in the year of our Lord one thousand eight hundred and — seven.

MOSES HALLETT, *Judge.*

60 [Endorsed:] Gen. No. 1341. Circuit court of the United States, district of Colorado. The British Queen Mining Company, plaintiff in error, *vs.* The Baker Silver Mining Company, defendant in error. Citation. Filed in circuit court of the U. S. this 9th day of Feb., A. D. 1887. Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. Fred'k W. Hankey, attorney for plaintiff in error.

Proof of Service.

THE UNITED STATES OF AMERICA, *District of Colorado,* } ss:

On this — day of ——, A. D. 18—, personally appeared —— —— before me, the subscriber, a clerk of the — court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed before me this — day of ——, A. D. 18—.

—— ——, *Clerk,*

By —— ——,
Deputy Clerk.

Received a true copy of within citation this 9th day of February, 1887.

WELLS, McNEAL & TAYLOR,
Attorneys for Defendant in Error.

61 UNITED STATES OF AMERICA, *District of Colorado,* } ss:

I, William A. Willard, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore had and entered of record in said court and in a certain cause lately in said court pending, wherein The Baker Silver Mining Company *et al.* were plaintiffs and The British Queen Mining Company was defendant, as fully and completely as the same still remain on file and of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 27th day of August, A. D. 1887.

[Seal United States Circuit Court, District of Colorado.]

WILLIAM A. WILLARD, *Clerk.*

Endorsed on cover: Colorado C. C. U. S. No. 169. The British Queen Mining Company of Colorado, plaintiff in error, *vs.* The Baker Silver Mining Company. Filed October 10, 1887.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

No. 169.

THE BRITISH QUEEN MINING COMPANY, Plaintiff in Error,

vs.

THE BAKER SILVER MINING COMPANY, Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

ARGUMENT OF COUNSEL.

JAMES B. BELDEN,
For Plaintiff in Error.

Proof of Service.

THE UNITED STATES OF AMERICA, }
District of Colorado, } ss:

On this — day of ——, A. D. 18—, personally appeared —— —— before me, the subscriber, a clerk of the — court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed before me this — day of ——, A. D. 18—.

—— ——, *Clerk,*
By —— ——,
Deputy Clerk.

Received a true copy of within citation this 9th day of February, 1887.

WELLS, McNEAL & TAYLOR,
Attorneys for Defendant in Error.

61 UNITED STATES OF AMERICA, }
District of Colorado, } ss:

I, William A. Willard, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore had and entered of record in said court and in a certain cause lately in said court pending, wherein The Baker Silver Mining Company *et al.* were plaintiffs and The British Queen Mining Company was defendant, as fully and completely as the same still remain on file and of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 27th day of August, A. D. 1887.

[Seal United States Circuit Court, District of Colorado.]

WILLIAM A. WILLARD, *Clerk.*

Endorsed on cover: Colorado C. C. U. S. No. 169. The British Queen Mining Company of Colorado, plaintiff in error, *vs.* The Baker Silver Mining Company. Filed October 10, 1887.

Office Supreme Court U. S.
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JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 169.

THE BRITISH QUEEN MINING COMPANY, PLAINTIFF IN ERROR,

vs.

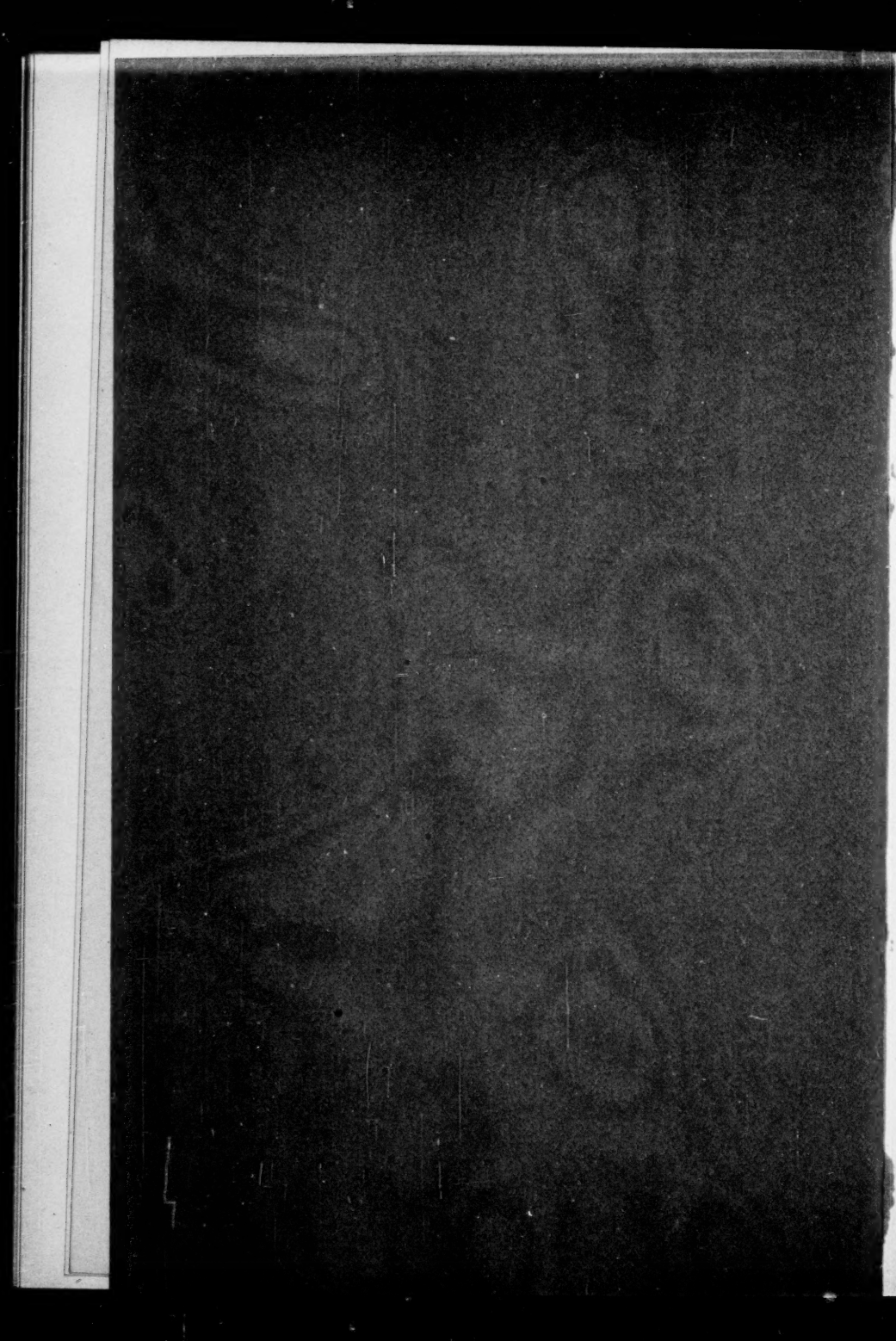
THE BAKER SILVER MINING COMPANY, DEFENDANT IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

ABSTRACT OF CASE.

JAMES B. REILLY,
For Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.



IN THE

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vs.

THE BAKER SILVER MINING COMPANY, DEFENDANT IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

ABSTRACT OF CASE.

STATEMENT.

This case was an action instituted by the Baker Silver Mining Company (defendant in error) against The British Queen Mining Company (plaintiff in error), in the circuit court of the United States for the district of Colorado, sitting at Denver, to recover the possession of certain real estate and premises situated in the county of Clear Creek and

State of Colorado, known and described as mineral survey No. 53, and as the Baker lode, with certain other premises described in the original complaint (page 2, Transcript of Record). Said action was so instituted September 24, 1883, and was tried by the court without a jury, pursuant to a written stipulation thereto filed, and judgment rendered therein in favor of said plaintiff (The Baker Silver Mining Company) on the 27th day of November, 1886; and afterwards, to wit, on the 9th of February, 1887, exceptions to said judgment having been duly taken, this writ of error and citation were sued out and duly served.

Abraham Kline and Charles W. Almy were joined as plaintiffs in the original summons issued in said case, but as to them the action was dismissed.

The Baker Silver Mining Company was a corporation created under and by virtue of the laws of Pennsylvania, and the British Queen Mining Company is a corporation organized under the laws of Colorado. So far as the record discloses, the only property of the said Baker Company was the premises in controversy in this case, and its principal, if not its only, business was the operation of the same.

On or about the 28th of June, 1879, an action was instituted in the district court of Clear Creek county, Colorado, to No. 2160, January term, 1880, by one Charles W. Betts, a citizen of Colorado, as plaintiff, against the said Baker Silver Mining Company to recover on certain bonds issued by said company and secured by said premises and held by said plaintiff, Betts, and judgment was rendered therein in favor of said plaintiff on the 9th day of July, A. D. 1879, for the sum of $4,974.66, with interest and costs. On the same day a writ of *fieri facias* on said judgment issued out of said court, directed to the sheriff of said county, by virtue of which the property in controversy in this suit was levied upon, said levy recorded in the recorder's office of said county July 10, 1879, and under said levy said property was sold by the sheriff aforesaid on the second day of August, 1879, to Charles

W. Betts. A sheriff's deed to said Betts for the same was executed and delivered May 3, 1880, and said Betts entered into possession of the premises. By virtue of sundry conveyances by Betts and his grantees, all of which were duly entered of record in the proper office in Clear Creek county, said premises became vested in the British Queen Mining Company April 4, 1882.

In the said suit instituted by Betts against the Baker Company in the court of Clear Creek county service of the writ was made upon one John I. McDuffie, a stockholder of said company, then residing in Colorado, pursuant to the provisions of a statute of Colorado in such case made and provided. The complaint, original writ, and return of the sheriff were not produced at the trial, having been mislaid or lost, and consequently do not appear in the record, and counsel now representing the plaintiff in error has been unable to obtain copies thereof. However, from the evidence adduced on the trial of the cause as well as from the printed briefs of the counsel for the defendant in error, it may be concluded that there is no controversy as to the fact that service of the writ in said case was had in the manner stated, and so returned by the proper officer.

It further appears from the record of the judgment entered in the case that the question of service was passed upon by the court, the record asserting that "in this action the defendant, having been regularly served with process," &c. (page 17, Record). Hence, for the purposes of the present case, we are justified in concluding that the record in said case showed that all the requirements to make the service regular under the laws of Colorado had been complied with.

At the trial of this cause the defendant below (plaintiff in error here) offered in evidence the said judgment in the Betts case, rendered by the district court of Clear Creek county, and the execution and subsequent proceedings thereon, all of which was objected to by the plaintiff for the

reason that it did not appear that said court had jurisdiction to render said judgment; but the trial judge reserved said objection until all of the evidence in the case could be introduced, and admitted evidence tending to show that said McDuffie was a stockholder of said Baker Company at the time of service of said writ, and that said company was engaged in business in said county and State. After hearing, the court rendered its decision (page 28) and entered judgment against the said defendant (plaintiff in error) for the premises in dispute; whereupon this writ of error was sued out.

ASSIGNMENTS OF ERROR.

Now comes the said defendant, plaintiff in error, and assigns as error why said judgment should be reversed:

I. The court erred in holding that the service had on the defendant in error, The Baker Silver Mining Company, in the State court was insufficient.

II. The court erred in holding said company was not doing business in Colorado so as to subject it to the laws of said State respecting service.

III. Said judgment was against the law.

IV. Said judgment was contrary to the facts.

BRIEF OF ARGUMENT FOR PLAINTIFF IN ERROR.

May it please the court:

The question presented by this record turns upon the validity of a certain judgment obtained by one Charles W. Betts against the defendant in error in the district court of Clear Creek county, Colorado, July 9, 1879, which is assailed upon two grounds, viz: First, that service of the writ was

defective because had upon a stockholder of said corporation, and, second, that said company was not engaged in business in said State at the time of such service.

The General Statutes of Colorado, chapter XIX, article 220, section 30, page 153, provides:

"In suits against any corporation summons shall be served in that county where the principal office of the corporation is kept or its principal business carried on, by delivering a copy to the president thereof, if he may be found in said county; but if he is absent therefrom, then the summons shall be served in like manner in such county on either the vice-president, secretary, treasurer, cashier, general agent, general superintendent, or stockholder of said corporation, within such time and under such rules as are provided by law for the service of such process in suits against real persons; and if no such person can be found in the county where the principal office of the corporation is kept or in the county where its principal business is carried on to serve such process upon, a summons may issue from either one of such counties, directed to the sheriff of any county in this State where any such person may be found and served with process. If such corporation keeps no principal office in any county and there is no county in which the principal business of such corporation is carried on, then suit may be brought against it in any county where the above-mentioned officers or any or either of them may be found: *Provided*, That the plaintiff may in all cases bring his action in the county where the cause of action accrued."

And article 213, section 23, page 151, provides:

"Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate, signed by the president and secretary of such corporation, duly acknowledged, with the secretary of state and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State, residing at its principal place of business, upon whom process may be served, and such corporation shall be subjected to all the liabilities, restrictions, and duties which are or

may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers; and no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members shall purchase or hold real estate in this State, except as provided for in this act; and no corporation doing business in this State incorporated under the laws of any other State shall be permitted to mortgage, pledge, or otherwise encumber its real or personal property situated in this State to the injury or exclusion of any citizen, citizens, or corporation of this State who are creditors of such foreign corporation; and no mortgage by any foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other State shall take effect as against any citizen or corporation of this State until all its liabilities due to any person or corporation in this State at the time of recording such mortgage have been paid and extinguished."

Not only the power but the propriety of such legislation by a State has been repeatedly recognized by this court. We will assume for the present, in considering this branch of the question, that the company was doing business in the State. In that event, why is not service of process upon a stockholder valid under the above statutes? True it is that article 260, relating to foreign corporations, requires them to make and file a certificate designating the principal place of business and an authorized agent upon whom process may be served, but it is also equally true that such corporations are made subject to all the liabilities, restrictions, and duties which are imposed upon domestic corporations. In the present case it is to be borne in mind that it was clearly established that the Baker Co. had failed to comply with the provisions or requirements of said article 260 (see page 26); but the fact that it had engaged in business in said State was tantamount to a compliance, for it thereby assented to do its business under and subject to the laws of the State, and it will not avail now, having enjoyed the privilege extended by the State to do business within its

borders, to attack or question the validity of the State's laws or its liabilities thereunder. To hold otherwise would be to simply grant immunity to foreign corporations from the effect and operation of the laws of a State in which they might find it of benefit to engage in business.

In support of this principle reference is made to the case of Railroad Company *vs.* Harris, 12 Wall., 65, which was cited and approved in the case, *Ex parte* Schollenberger, in 96 U. S. Rep., p. 375, where this Court, alluding to the former decision, say, "the language of the court, speaking through Mr. Justice Swayne, is:

"It (a corporation) cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the laws of the place. One of these conditions may be that it shall consent to be sued there. *If it do business there, it will be presumed to have assented, and will be bound accordingly.*"

And again, even the case of St. Clair *vs.* Cox, 106 U. S. Rep., 356, upon which the court below ruled this case and counsel for defendant in error now rely to sustain that ruling, recognizes this doctrine:

"A corporation of one State cannot do business in another without the latter's consent, express or implied, and that consent may be accompanied with *such conditions* as it may think proper to impose. * * * The State may therefore impose as a condition upon which a foreign corporation shall be permitted to do business within her limits that it shall stipulate that in any litigation arising out of its transactions in the State it will accept as sufficient the service of process on its agents or persons specially designated; and the conditions would be eminently fit and just. And such condition and stipulations may be implied as well as expressed. If a State permits a foreign corporation to do business within her limits and at the same time provides that in suits against it for business there done process shall be served upon its agents, the provision is to be deemed a condition of the permission, and corporations that subsequently do business in the State are to be deemed to assent to such conditions as

fully as though they had specially authorized their agents to receive service of the process."

St. Clair *vs.* Cox, *supra.*

This same doctrine was announced in the case of Lafayette *vs.* French, 18 How., 404.

In the light of these authorities it is respectfully submitted that the validity of the above statutes of Colorado cannot be assailed by the defendant in error.

The only question remaining in this connection is as to the validity of the service upon a stockholder as designated and provided by the statute may be done in the absence of an officer or agent. That question was touched upon but not decided in St. Clair *vs.* Cox, and all, it is submitted, that was decided in that case was that it must appear that the corporation was engaged in business in the State where the process issued; and assuming, as we do for the present, that such is the fact in the case at bar, why, it may be asked, is not the provision of the statute in question authorizing service upon a stockholder valid, especially where, through the failure of the corporation itself to comply and bring itself within the provisions of the law, such service is prescribed? As to the facts here, there is no controversy. It is not only established by proof, but admitted, that McDuffie, upon whom service was made, was a stockholder of said corporation, residing within the jurisdiction of the court, and that fact, although established by evidence, must, it is submitted, be treated as though it appeared in the record. In other words the court had judicial knowledge of the fact. A stockholder is certainly a party interested, and there would seem to be as much justice in authorizing service upon him as upon an agent; and if it be conceded the legislative power of the State extends to imposing service upon an agent, it is difficult to comprehend why it has not the power to include a stockholder as a person upon whom service may be had. Surely the pre-

sumptions are that his interests in the corporation would lead him to protect its rights quite as eagerly as would a simple agent. It may not be improper in this connection to call attention to the fact that no attempt was made by defendant in error to prove that it had no notice of the Betts suit, nor that the judgment rendered in that case was not founded upon a subsisting and legal liability. That judgment was rendered in July, 1879, and, pursuant to the sale under it, possession of the property passed out of the hands of the Baker Company. It certainly had knowledge of all this. Again, the property passed subsequently through the hands of several innocent purchasers, all of which conveyances were spread upon the public records, and notice of which, constructively at least, it must have had. Yet, notwithstanding all this, said company, with apparently full knowledge of everything it now complains of, waits four years before making an effort to assert any rights it might have in the premises. Does not this suggest the inquiry, What equities has this corporation in the present attitude of this case? Would it be more than just and proper to demand that it should make some showing that its property was condemned without notice, or that the judgment was founded upon an unjust claim?

Some insinuations have been made as to this judgment having been collusively obtained, but the trial judge refused to hear it, and hence no such question can be raised or presented for the consideration of this court. Moreover, this is a controversy with the plaintiff in error, conceded to be an innocent purchaser in good faith, and which was not a party to or in any way connected with the Betts case. There is no allegation anywhere in this record that the defendant in error did not have knowledge—that is, notice—of the suit instituted by Betts through the service of the writ upon the stockholder aforesaid; and if, as a matter of fact, it had such knowledge, so derived, it would certainly be a great hardship and work manifest injustice to allow it

now, after sleeping upon its privileges so long, to step in and sweep away rights acquired by innocent parties.

Again, the evidence adduced at the trial also established that the principal business of said corporation was carried on in said county of Clear Creek; that the president thereof could not be found in said county; that there was neither vice-president, secretary, treasurer, cashier, general agent, or general superintendent within said county, and that, consequently, the service of the writ upon a stockholder found in the county was expressly authorized by the terms of the statute. Under this state of facts it is submitted that such service was valid and binding, unless it shall be held that it was incompetent on the part of the State of Colorado in the exercise of its sovereign power to frame any such enactment.

The second proposition involved in this case, as already stated, raises the question as to what constitutes "doing business" in a State by a foreign corporation. The learned trial judge, upon the facts before him, decided as a matter of law that the said corporation was not engaged in business at the time of the service of the writ in the Betts case.

In the first place, it appears, from the admission of defendant in error in its original complaint filed in this case (see complaint, page 2, Transcript of Record), that the premises were "the same premises in the year 1866 and in divers years thereafter, until on or about the first day of August, A. D. 1879, occupied, possessed, and *worked* by the said plaintiff."

It further appeared in evidence that in the year 1878 the Baker Company, by its secretary and treasurer, executed a lease to R. B. Weiser for the term of two years, granting certain mining privileges in and upon said property, stipulating for the payment of the royalties due the Baker Company

by the lessee to certain debts of the company to parties in the State of Colorado; that all lodes discovered should be the property of the Baker Company; that half the cost of hauling ore was to be deducted from the gross proceeds; that said lessee should report monthly to the secretary of the company so long as it had no agent in the State, &c. (Record, page 26); which lease was a modification of a certain other lease executed by the agent of said company a short time prior, and both of which were executed in the State of Colorado.

Upon this state of facts the learned trial judge held that the company was not carrying on business within the State. We apprehend it will not be denied that the only object and purpose for which said corporation was organized was the operation of this mining property in Colorado. The practical and sole purpose for which a mining company is organized generally is to operate such mining property as it may become possessed of, and this operation may be carried on as well through a lessee as by its own workmen, directly employed. In either case it is necessarily the business of the corporation. If the position taken by the learned trial judge be correct, the intention of the legislative enactment would be entirely overthrown. A foreign corporation, in that view, might enter a State, acquire mining property, issue bonds, or contract other obligations; immediately let out its property to lessees, withdraw all its business management from the State, and failing or refusing, if you please, to designate an agent as required by the statute, enjoy all of the privileges appertaining to domestic corporations and escape all the liabilities imposed by law upon them.

It cannot be said that this lease was a grant of the premises, so as to divest the corporation of all interest therein. The company had the right to enter and retained ownership and control of the premises and of all new lodes discovered, thereby carrying on business by prospecting through its les-

see. It paid one-half of certain expenses of the business and required monthly statements to be furnished to it. The corporation sent its officer into the State, and the business was transacted in the State and with a citizen of the State where the subject-matter and business of the contract was to be carried on. Surely it cannot be seriously contended, under the terms of such a lease, that this company was not engaged in "business" within the State.

The language of the Colorado statute above recited is "*to do any business in this State.*" If these words shall be construed not to embrace such transactions as was shown in this case, then it is easy to perceive how readily, as above stated, a foreign corporation may escape all liability under said statute.

"A corporation is defined to be 'an artificial being, invisible, intangible, and existing only in contemplation of law.' It can do no acts either within or without the State which creates it, except such as are authorized by its charter. * * * Taking language in its ordinary acceptation, a corporation does business by the exercise of its power to contract, its power to acquire and hold property, real and personal, and like powers. By the exercise of these corporate powers it carries on its corporate business in the ordinary meaning of the term. By their exercise it establishes its business relations, assumes obligations, and acquires rights."

Utley *vs.* The Clark Gardner S. M. Co., 4 Col., 373.

While the decisions of this Court hold that it is necessary in cases of this character to show that the corporation was engaged in business in the State, yet, so far as counsel are aware, the question as to what transactions exactly shall be regarded as carrying on business has not been passed upon. Under the language of the Colorado statute, it is submitted that the evidence presented on the trial of this case brought the defendant in error clearly within its scope; hence it is here contended that the ruling of the learned judge below was error. It will be observed that the general laws of Col-

orado charge foreign corporations with the duty of designating an agent upon whom process may be served before they are "authorized to do any business" in the State, and thus also confers a privilege by which it can protect itself from service upon a mere stockholder or some one not directly representing it in its business; so that, if a foreign corporation coming into that State to do business does not comply with the statute and designate its agent upon whom service can be had, it not only violates its duty but renounces a privilege given to it by the same law, and it must naturally follow that the foreign corporation so culpable cannot be heard to complain that a stockholder was served with process in a suit against it, because it was within their power to have prevented such service. Being placed upon an equal footing with domestic corporations and sharing all the benefits of State legislation equally with those corporations, the foreign corporation doing business in the State must do so with reference to the laws thereof. This would seem to be in harmony with every principle of natural justice and commercial necessity.

It is therefore respectfully submitted that the decision in St. Clair *vs.* Cox, upon which the learned trial judge relied, does not rule the case at bar.

If the statute of Colorado is held to be valid, then, it appearing in this case, as we contend, that service was duly had in pursuance of its provisions, and that the said corporation was, as a matter of law, under the facts in evidence, engaged in business at the time of said service, we feel warranted in praying for a reversal of the judgment at the hands of this Court.

JAMES B. REILLY,
For Plaintiff in Error.

Office Supreme Court U. S.
FILED.
OCT 15 1890
JAMES H. McKENNEY,
CLERK.

— IN THE —

Supreme Court

— OF THE —

UNITED STATES.

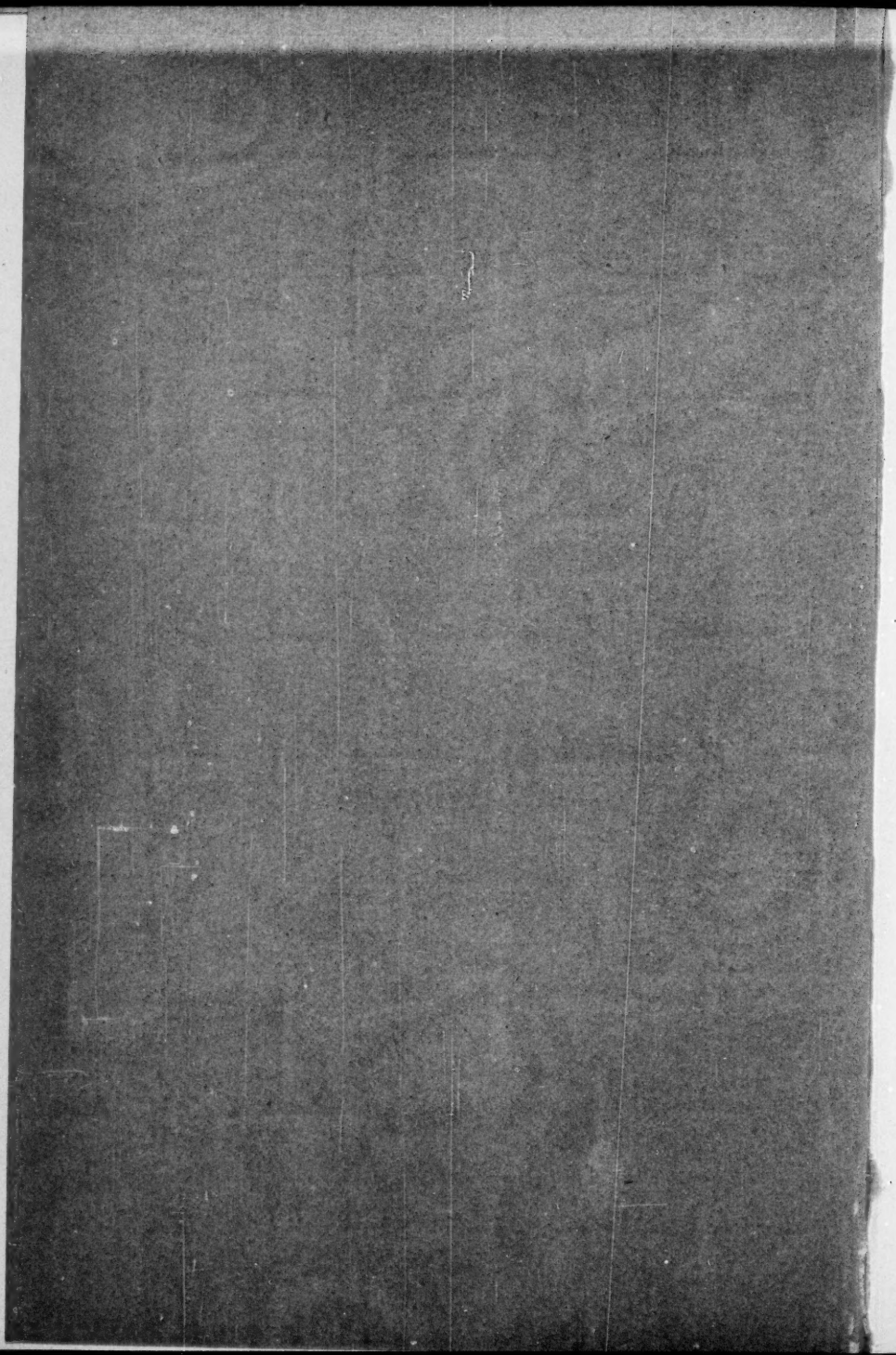
THE BRITISH QUEEN MINING COMPANY,
Plaintiff in Error.

vs.

THE BAKER MINING COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

E. T. WELLS,
R. T. McNEAL,
JOHN G. TAYLOR,
for Defendant in Error.



— IN THE —

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THE BRITISH QUEEN MINING COMPANY,
Plaintiff in Error.

vs.

THE BAKER MINING COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

May it please the Court:

This was an action in the nature of an action of ejectment, to recover certain mining premises, situate in the county of Clear Creek in said district. Abraham Kline and Charles W. Arny were in the beginning named as joint plaintiffs with the Baker Silver Mining company, a Pennsylvania corporation, and the British Queen Mining company, a Colorado

corporation, now plaintiff in error, was named as defendant. As to Kline and Arny, the action was afterwards dismissed. The answer, (print 6, 7,) admits that on the second of August, 1879, the corporation plaintiff had an estate in fee simple in the three lodes described in the complaint, and was possessed of the mill-site and other premises; denies that it had any such right after that date, and avers that on the day mentioned the corporation plaintiff ceased to exist, and that defendant's grantor became entitled to the lode premises in fee simple absolute, and acquired possession of the other premises, and entitled to the same right of possession as the corporation plaintiff had and held before that, and that this estate and right of possession afterwards by divers conveyances passed to defendant.

The replication controverted all the material allegations of the answer. After divers intermediate proceedings, the issue came on to be tried on the twenty-seventh day of November, 1886, before the judge of the District court, presiding in the Circuit court, without jury, pursuant to the stipulation in writing of counsel. All the issues were found for the plaintiff, the Baker Silver Mining company, and judgment was given accordingly. (Print, 13–15.)

There was no special finding of the facts, but a bill of exceptions was taken setting forth a portion of the evidence heard in said court,—not purporting to set forth the whole of the evidence,—in

which is set out also the opinion of his honor the district judge. From this opinion it may be inferred that defendant deraigned title under a sale upon an execution issued upon judgment given in a personal action in favor of one Betts and against the Baker Silver Mining company in the District court of the state of Colorado for the county of Clear Creek, upon an attempted service of process upon one McDuffy, a stockholder of the company, the company not being then in any manner conducting its operations or exercising its powers within the limits of the state of Colorado, or represented there by any agent whatsoever, and McDuffy being in fact, although not in name, the plaintiff in this action. (Print. 20–28–30.)

I.

The case presented by the record is not one which can be reviewed upon error.

Prior to the enactment of the act of March 3, 1865. (Rev. Stat. § 700.) the judgment given in a cause tried without a jury could not be reviewed upon a writ of error.

Guild vs. Frontin, 18 How. 135.
Kelsey vs. Forsyth, 21 How. 85.
Campbell vs. Boyieau, 21 How. 283.

The act in question authorizes a review of "the *rulings of the court in the progress of the trial if excepted to at the time*, and duly presented by bill of ex-

ceptions, * * * *and when the finding is special, the review may extend to determination of the sufficiency of the facts* found to support the judgment."

This is the only act of congress authorizing a review of a judgment at law upon an issue tried by the court without a jury.

Boogher vs. Insurance Co., 103 U. S. 90.

The jurisdiction of the court is specially limited by the act.

(1) To a review of the rulings in the progress of the trial, and

(2) To a review of the sufficiency of the facts found by the court to sustain the judgment.

In the present record no exceptions were reserved by the defendant in error to the rulings of the court during the progress of the trial; in point of fact all these interlocutory determinations were in its favor.

Neither was there any special finding of any fact. The opinion of the court is not to be received as a finding of facts.

Insurance Co. vs. Tweed, 7 Wal. 51.

Norris vs. Jackson, 9 Wal. 127.

The bill of exceptions can no more be used to bring up for review the whole evidence, where the issue is found generally by the court, than where the finding is by a jury; and assuredly the court will not, upon the facts, review a general finding, where, as in the present case, it has not the whole of the evidence before it.

II.

If the opinion of the court set up in the bill of exceptions be accepted as a finding of the facts, no error was committed in such finding.

The defendant's answer admitted title in the plaintiff down to the second of August, 1879, and an effort was made to deraign title by execution sale upon a judgment by default recovered in the state court against the corporation which was plaintiff below, and this judgment the court properly declared void upon the two grounds:

1. The judgment of the state court relied upon, was mere personal judgment in an action for the recovery of damages. There was nothing in the record of that judgment to show that defendant in that action was at the time carrying on business or exercising its powers within the limits of the state of Colorado. In the present action the contrary of this was expressly made to appear, (print, 22–23,) and the case of *St. Clair vs. Cox, 106 U. S. 350*, cited by his honor the district judge, is conclusive authority that a judgment thus rendered in the courts of one state against a corporation of another state, is utterly void.

2. It was incontestably shown that in point of fact, the action in the state court (the judgment wherein the foundation of the defendant's title) was collusively instituted by the plaintiff named therein, at the instance of the very stockholder upon whom the process was served; that such stockholder

employed counsel and paid the costs, controlled the judgment and obtained all the benefits and advantages thereof. (Print, 26–27.)

Happily, no reported case found where such an abuse of legal process, as exhibited in this record, has been attempted; but the proposition that a judgment so obtained is absolutely invalid, needs not the support of authority.

We reiterate our positions: First. That the judgment of the court is not reviewable upon this record; and second. If reviewed, it must be affirmed.

E. T. WELLS,
R. T. McNEAL,
JOHN G. TAYLOR,
for Defendant in Error.

COLLINS PRINT 1418-20 LARIMER, DENVER.

JAN 13 1891
JAMES H. MCKENNEY
CLERK

No. 1[illegible], October Term, 1890.

In the Supreme Court of the United States.

The British Queen Mining Company of Colorado,
Plaintiff in Error,

vs.

The Baker Silver Mining Company

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

ADDITIONAL BRIEF OF DEFENDANT IN ERROR.

A. H. WINTERSTEEN,
WAYNE MacVEAGH,
For Defendant in Error.

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COLLINS PRINT. 1418-20 LARIMER, DENVER.

Office Supreme Court U.S.
FILED,
JAN 13 1891
JAMES H. McKENNEY
CLERK

No. 169. October Term, 1890.

In the Supreme Court of the United States.

The British Queen Mining Company of Colorado,
Plaintiff in Error,

vs.

The Baker Silver Mining Company.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

ADDITIONAL BRIEF OF DEFENDANT IN ERROR.

A. H. WINTERSTEEN,
WAYNE MACVEAGH,
For Defendant in Error.

Allen, Lane & Scott, Prs., Phila.

SUPREME COURT OF THE UNITED STATES.

The British Queen Mining Company of Colorado vs. *The Baker Silver Mining Company.*	October Term, 1890. No. 169.

ADDITIONAL BRIEF OF DEFENDANT IN ERROR.

The facts of the case are fully stated in the principal brief for defendant in error.

The case of the plaintiff in error, it is submitted, is absolutely without merit.

It rests wholly upon the question of the validity of a certain judgment alleged to have been obtained against the defendant in error by one Charles W. Betts, July 9th, 1879 (Record, page 17), under which judgment the plaintiff in error claimed to derive title by sale to it after execution and purchase by the plaintiff in the execution (Record, pages 18, 19, folio 33). It was admitted that the title of the Baker Company was good up to August 2d, 1879, when the sheriff's deed was made to Betts, and it is indisputable, so far as the record shows, that if the deed to Betts did not pass title, by reason of the invalidity of the judgment on which the execution of Betts was founded, the British Queen Company is without a case.

The opining of the court below (Record, pages 28–29, folios 50–53) is sufficiently conclusive, and any argument submitted for the defendant in error can only be an elaboration of the views of the law upon which the case was decided.

It is merely proposed, at this time, in urging the necessity of an affirmance of the judgment, to show from the authorities how wholly unassailable are the positions of the defendant in error.

Of these positions two are uppermost.

1. The record of the judgment from which the plaintiff in error derives title does not establish jurisdiction over the Baker Company to support the judgment.

2. No sufficient proof of facts is made in the testimony in the cause to establish jurisdiction in the matter of this judgment.

1. The record of the judgment from which the plaintiff in error claims title does not establish jurisdiction over the Baker Company to support the judgment.

Since the decision in St. Clair *vs.* Cox, 106 U. S., 350, it has been well understood that foreign corporations are amenable to suit only under certain conditions.

"In the absence of a voluntary appearance, three conditions must concur or coexist in order to give the Federal Courts jurisdiction *in personam* over a corporation created without the territorial limits of the State in which the court is held, viz.: (1) It must appear as a matter of fact that the corporation is carrying on its business in such foreign State or district; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such State; and (3) the existence of some local law making such corporation, or foreign corporation generally, amenable to suit there is a condition, express or implied, of doing business in the State."

U. S. *vs.* American Bell Telephone Co., 29 Fed. Rep., 17, 35.

And the fact of the carrying on business in the State and of the agency must affirmatively appear in the record offered in evidence in order to establish jurisdiction against the defendant. This was flatly decided in St. Clair *vs.* Cox.

The absence of the averment that the foreign corporation is doing business in the State or is found therein can not be sup-

plied by proof *aliundi* the record offered at the trial of a subsequent suit predicated on an alleged prior judgment.

"The defects of the record can not be so pieced or patched up by parol."

Henning *vs.* Planters' Ins. Co., 28 Fed. Rep., 440;
Montgomery *vs.* Merrill, 36 Mich., 97.

As it was observed in the latter case, jurisdictional facts can not rest in parol to be proved in one case, and perhaps disproved in another. The record must be complete in itself.

This being the law, the defendant to make out its defense in the court below was obliged to produce a record showing upon its face that the Baker Company was engaged in business in Colorado, and had an agent there when the Betts' judgment was obtained. The record of the proceedings in the Betts' judgment offered in evidence (Record, pages 17, 18) shows nothing of the kind.

The only thing in the record even suggesting the existence of facts sufficient to validate the proceedings is the recital in the judgment by default, "the defendant having been regularly served."

That this recital is insufficient is clear. It is a conclusion of law at best, and will not do away with the averment of facts necessary to support it. No presumptions in favor of jurisdiction exist in such a case.

Alexandria *vs.* Fairfax, 95 U. S., 774, 780;
Grace *vs.* American Central Ins. Co., 109 U. S., 278, 283.

In the case of the United States *vs.* American Bell Telephone Co., above referred to, a marshal's return of a subpœna as served upon the agent of the defendant, was deemed insufficient for jurisdictional purposes over a Massachusetts corporation proceeded against in Ohio.

The judgment must, therefore, be affirmed for want of legal proof of jurisdiction over the Baker Company appearing in the only competent evidence offered to defeat the claim—the record of the Betts judgment.

2. *No sufficient proof of facts is made in the testimony to establish jurisdiction over the defendant in the Betts judgment.*

The trial judge was unduly liberal in allowing the defendant to prove, if he could, by parol that the Baker Company was amenable to service in Colorado. No portion of the defendant's oral evidence admitted by the court is, of course, competent. But for argument's sake, assuming it to be admissible, it not only fails to validate the Betts judgment on jurisdictional grounds, but discloses such facts as to the obtaining of that judgment as stamp it void for all purposes. These facts are, indeed, unique. Betts, the nominal plaintiff in the suit, was a figure-head. He represented John I. McDuffy, who went to Colorado to sue the company on certain bonds he held. (Record, page 27.) He also appears to have been a stockholder. He puts the bonds in Betts' name, and then begins suit in the name of Betts, and has service made upon himself as a stockholder of the company, attempting to bind the company by virtue of a Colorado statute which, under certain circumstances, permits service upon corporations through their stockholders. McDuffy was, therefore, in fact, plaintiff, and had himself served with process on behalf of the defendant. The court very properly declined to tolerate such a scheme to fasten a judgment upon the Baker Company.

But, if it were possible to overlook or get beyond this obvious circumstance, which stamps the service and the judgment following it a fraud, the law itself on the other facts disclosed would avoid the judgment for want of jurisdiction.

The law of Colorado as to service on corporations is as follows:—

General Statutes of Colorado, article 267, page 187:—

"In suits against any corporation summons shall be served in that county where the principal office of the corporation is kept or its principal business carried on, by delivering a copy to the president thereof, if he may be found in said county; but if he is absent therefrom, then the summons shall be served in like manner in such county, on either the vice-president, secretary, treasurer, cashier, general agent, general superintendent, or stockholder of said corporation, within such time and under

such rules as are provided by law for the service of such process in suits against real persons, and if no such person can be found in the county where the principal office of the corporation is kept, or in the county where its principal business is carried on, to serve such process upon, a summons may issue from either one of such counties, directed to the sheriff of any county in this State where any such person may be found, and served with process. If such corporation keeps no principal office in any county, and there is no county in which the principal business of such corporation is carried on, then suit may be brought against it in any county where the above-mentioned officers or any or either of them may be found: *Provided*, That the plaintiff may, in all cases, bring his action in the county where the cause of action accrued."

260, page 186:—

"Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate signed by the president and secretary of such corporation duly acknowledged with the Secretary of State, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State, residing at its principal place of business upon whom process may be served, and such corporation shall be subjected to all the liabilities, restrictions, and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers."

If the service in the Betts proceeding is attempted to be sustained under the Colorado law as a service upon a foreign corporation, by serving a stockholder *as such* found within the State, it is invalid for the reason that any law which assumes to bind the foreign corporation in this way is itself invalid. It will be observed that the Colorado statute as to service on corporations through their stockholders refers solely to Colorado corporations. There is nothing whatever in the portion of the statute relating to foreign corporations which attempts

to bind the corporation by a stockholder's service. It is only by construction that the law can be held to apply to foreign corporations. If such be its proper construction it is *pro tanto* invalid, for it contravenes the principle of natural justice which forbids condemnation without opportunity for defense.

Lafayette Ins. Co. *vs.* French, 18 How., 404, 407;
St. Clair *vs.* Cox, 106 U. S., at page 359.

It needs no argument to show that a mere individual stockholder of a corporation, owning an interest in its property, is distinct from the corporation itself, and cannot, without more, represent it. He certainly cannot in his person bring it as a foreign corporation within the State so as to expose it to service and loss of property.

It is plain that the service on McDuffy as stockholder was valueless.

There remains to consider whether the service upon McDuffy as agent of the corporation or in any other capacity bound the latter.

It did not bind it, because neither was the corporation carrying on business in the State at the time, nor had it an agent or officer appointed to represent it there.

"It cannot be held sufficient to give (a State court or a circuit court) jurisdiction *in personam* over a foreign corporation that it has property rights, however extensive, within the district, or that it has pecuniary interests, however valuable, in business managed and conducted by others. It must itself be carrying on business in its own right, on its own responsibility, and for its own account and through or by means of its own agents, officers, or representatives in order to bring it within the operation of the laws of a State other than that in which it is incorporated, making it amenable to suit there as a condition of its doing business in such State."

United States *vs.* American Bell Telephone Co.

"An agent of a foreign corporation upon whom service can be made must be one actually appointed by or representing the corporation as a matter of fact, not one created by im-

plication or construction, contrary to the intention of the parties."

Ibid.

See also Good Hope Company *vs.* Railway Barb-Wire-Fence Co., 22 Fed. Rep., 635;

Boston Electric Co. *vs.* Electric Gas Light Co., 23 Fed. Rep., 838;

St. Louis Wire Mill Co. *vs.* Consol. Barb-Wire Co., 32 Fed. Rep., 802.

Maxwell *vs.* Atchison, T. & S. F. Ry. Co., 34 Fed. Rep., 286.

There is nothing whatever to show that the Baker Company was engaged in business in Colorado at the time of the service in the Betts suit. All that appears is that the company had property and property rights as lessor in certain real estate it had leased to a tenant. And so far from McDuffy being its agent or representative, his position was avowedly hostile to the company, and there could be no possible pretense that he represented it for any purpose whatever.

With nothing, therefore, in evidence to show jurisdiction over the Baker Company in the Betts suit, it was clearly the duty of the court to find for the plaintiff, as there was nothing else whatever in the defendant's case.

In view of the law and the facts of record, it is difficult to believe that the writ of error was taken with any serious purpose except for delay.

There will, it is believed, be no hesitancy in affirming the judgment.

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For Defendant in Error.